Supreme Court, U.S.
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No. ____

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Arkansas Educational Television Commission ("AETC") operates a state-wide network of five noncommercial, educational ("public") television stations.

1. Did the Eighth Circuit violate AETC's editorial rights under the Communications Act by requiring a "viewpoint-neutral" rationale for AETC's choice of invitees to a political debate, even though selection of debate participants, based on news judgment, is integral to Section 315 of the Communications Act, and even though the Fifth Circuit reached a directly conflicting conclusion?

2. By holding, contrary to a decision of this Court and to decisions of other circuits, that AETC cannot exercise editorial discretion -- a fundamental responsibility of all broadcast licensees -- did the Eighth Circuit create a private right of broadcast access contrary to the Communications Act; entangle itself in programming judgments contrary to decisions of this Court; violate AETC's First Amendment rights; and effectively constrict state-network and state-university broadcasters' coverage of controversial political and cultural events and issues?

3. By holding that a candidate who is not included in a state public broadcaster's political debate can maintain a First Amendment action in federal district court, did the Eighth Circuit violate the Federal Communications Commission's exclusive jurisdiction to judge all such complaints in the first instance?

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*/ The Arkansas Educational Television Commission controls the Arkansas Educational Telecommunications Network Foundation, a non-profit, tax-exempt Arkansas corporation. Petitioner is aware of no other parties required to be listed.

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The Arkansas Educational Television Commission respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (App. 1a) is reported at 22 F.3d 1423 (8th Cir. 1994). The opinion of the United States District Court for the Western District of Arkansas (App. 37a) is unreported.

JURISDICTION

The Eighth Circuit entered its judgment on April 28, 1994, and entered its order denying rehearing on June 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the district court was invoked under the First Amendment to the United States Constitution and 28 U.S.C. §1331 (general federal question jurisdiction).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Sections of the Arkansas Code Annotated, ARK. CODE ANN. §§ 6-3-101-113, 25-16-804; the First Amendment to the United States Constitution; the Communications Act of 1934, as amended, Sections 3(h), 309(a), 312(a)(7), 315(a), and 402(a) (codified at 47 U.S.C. §§ 153(h), 309(a), 312(a)(7), 315(a), and 402(a) (1988)); and the rules of the Federal Communications Commission, 47 C.F.R. §§ 73.1941, 73.1944, are found in the Appendix.

STATEMENT

In October, 1992, Petitioner Arkansas Educational Television Commission ("AETC"), together with the Associated Press, arranged to conduct and broadcast a debate between the Republican and Democratic candidates for the office of United States Representative for the Third District of Arkansas. AETC did not invite Respondent Ralph P. Forbes, an independent candidate for that office, to participate.

A. The Arkansas Educational Television Commission

AETC is an agency of the State of Arkansas, organized for the purpose of making the benefits of educational television available to inhabitants of Arkansas. AETC operates the Arkansas Educational Television Network ("Network"), consisting of five noncommercial educational television stations licensed to AETC by the Federal Communications Commission ("FCC").

AETC has eight members appointed by the Governor of Arkansas with the advice and consent of the state Senate. The members may not hold any other state or federal office, or hold employment paid in whole or part by funds derived from tax sources, except for educators in the state's public schools or institutions of higher learning. The members serve eight year terms and may be removed only for good cause. AETC's Executive Director is Susan Howarth.

B. Procedural History

By letter dated August 24, 1992 to Susan Howarth, Forbes notified AETC that he was an independent candidate for U.S. Representative from the Third District of Arkansas and requested to be included on equal terms in the debate between his opponents (App. 77a). On September 4, 1992, Howarth responded by letter stating that under Section 315(a) of the Communications Act, 47 U.S.C. §315(a), as interpreted by the FCC and the courts, debates were exempt from the equal opportunity requirement, and that AETC had made a bona fide journalistic judgment that its viewers would be best served by limiting the debate to elected nominees of the two major parties. Howarth also invited Forbes to contact the Fairness/Political Programming Branch of the FCC's Enforcement Division and supplied its telephone number (App. 75a).

On October 19, 1992, three days before the debate, Forbes sued AETC, its members, its Executive Director and others in the United States District Court for the Western District of Arkansas. He alleged that, because he had qualified for the ballot as an independent candidate, he had a right to be included in the debate. He also alleged that he telephoned the FCC and was told to go through the motions of filing a complaint, but that doing so would be a waste of time. Forbes alleged that he wrote to the FCC to request that his complaint be denied speedily so that he could seek an injunction in court. The FCC responded with a letter enclosing a statement of applicable law and instructions on how to file a complaint.

Forbes alleged that AETC's decision not to include him in the debate violated the Civil Rights Act, 42 U.S.C. §1981 *et seq.*, and his First Amendment rights. He sought

declaratory and injunctive relief and compensatory and punitive damages.

Forbes' motion for a preliminary injunction to mandate his inclusion in the debate was denied by the district court on October 20, 1992. On October 21, 1992 and October 22, 1992, respectively, the Chief Judge and a panel of the United States Court of Appeals for the Eighth Circuit denied Forbes' request for an injunction pending appeal. The debate was broadcast without Forbes' participation on October 22, 1992.

One week after the election, AETC filed a motion to dismiss the complaint under Rule 12(b)(6), FED.R.CIV.P.12(b)(6), arguing that Forbes had no First or Fourteenth Amendment right to appear in a television debate, that he had no private cause of action under the pertinent political broadcasting provision of the federal Communications Act of 1934, 47 U.S.C. §315, and that he failed to state a claim under the Civil Rights Act. AETC also stated that, even if a private cause of action existed under §315, the debate was exempt from the equal time provision of Section 315 as on-the-spot coverage of a bona fide news event (App.67a).

The district court granted AETC's motion and dismissed the complaint on December 16, 1992, concluding that Forbes can "'prove no set of facts in support of his claim which would entitle him to relief.'" (App. 40a.) The District Court held, in light of *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), that Forbes had no cause of action under the Communications Act or the Civil Rights Act for denial of participation in the congressional debate. The District Court stated that Forbes must seek remedy for his alleged violations with the FCC.

A panel of the Eighth Circuit denied Forbes' request for rehearing on the issue of preliminary relief on December 22, 1992. *En banc*,[1/] the Eighth Circuit affirmed the District Court's dismissal of Forbes' statutory claims, holding that he had no private cause of action to enforce 47 U.S.C. §315, that he was required to bring his claim under that statute to the FCC, and that he failed to exhaust his administrative remedies. The Eighth Circuit also affirmed the District Court's dismissal of the Civil Rights Act claims. However, the Eighth Circuit held that Forbes did state a First Amendment claim sufficient to survive a motion to dismiss.

The Eighth Circuit acknowledged that, generally speaking, a candidate does not have the right to demand air time. However, the court concluded that AETC, as a "state-owned television network" (App. 9a-10a), is a state actor. The court held that the actions of AETC and its employees are attributable to the State and subject to the Fourteenth Amendment, unlike the actions of non-state owned broadcast licensees (App. 10a). On that basis, the court distinguished *Kennedy for President Comm. v. FCC*, 636 F.2d 417 (D.C. Cir. 1980), where the D.C. Circuit concluded that denying equal opportunities to a candidate under Section 315 was not a violation of the candidate's First Amendment rights.

The Eighth Circuit undertook a forum analysis. Citing *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), it found that, even if AETC's Network is a nonpublic forum, because Forbes was a member of the class of speakers for whose benefit the debate was held (Third District candidates) and he wished to address the topic encompassed by the debate (who should be elected to

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1/ In the rehearing *en banc*, the FCC filed a brief in support of AETC.

Congress), AETC would violate Forbes' First Amendment rights if it failed to include him because of objections to his viewpoint (App. 12a). The court held that AETC must provide a "rational and viewpoint neutral justification" for its determination not to include Forbes in the debate (App. 14a).

The Eighth Circuit explicitly reversed its previous decision in *DeYoung*, deciding that, in holding that no First Amendment right to appear in a televised debate exists, at least beyond that given by Section 315, and in relegating candidates to the FCC for a remedy, *DeYoung* was "wrongly decided" (App. 10a). The court disagreed with the Eleventh Circuit's decision in *Chandler v. Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991), which found no First Amendment right of access in a closely similar factual situation. The court also distinguished *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983), in which the Fifth Circuit rejected efforts by public television viewers to force state public broadcast licensees in Alabama and Texas to air a particular program (App. 12a-13a n.4).

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision Discards Congress' Statutory Scheme for Political Debates and for Exclusive FCC Review of Licensee Bona Fide News Judgments Under Section 315 of the Communications Act, Contravenes the First Amendment, and Conflicts With Decisions of this Court and Other Circuits

The Communications Act's regulatory scheme is built around licensee control of program content:

> The legislative history of the [Act] reveals that in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. Congress specifically dealt with--and firmly rejected--the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.

Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973) (citation omitted) ("*CBS v. DNC*").

The Eighth Circuit held that, because the Arkansas Network is a nonpublic forum, "AETN must provide a rational and viewpoint-neutral justification for its determination" not to include Forbes in the debate. (App. 14a.) This is a wholly new test for reviewing a broadcast licensee's coverage of a bona fide news event. It conflicts with the statutory scheme as interpreted in *CBS v. DNC*, both for political broadcasting and for public broadcasting; and it conflicts squarely with *Chandler*, where the Eleventh Circuit held that the Libertarian candidates for governor and

lieutenant governor of Georgia[2/] had no right to participate in a debate initiated and broadcast[3/] by the Georgia Public Telecommunications Commission ("GPTC").

The Eighth Circuit evaluated AETC's exercise of programming judgment under forum cases (App. 10a-14a.) and concluded that, at best, a state public television network is to be treated as a nonpublic forum (App. 11a-12a). This holding transmogrifies the editorial role of state-related public television and radio licensees. State broadcast licensees are no longer "'entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public [duties],"'" as described in *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981)), and as described in decisions of the D.C. Circuit, *Community-Serv. Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978); the Fifth Circuit, *Muir*, 688 F.2d 1033; and the Eleventh Circuit, *Schneider v. Indian River Community College Found.*, 875 F.2d 1537 (11th Cir. 1989).

Enforcing "viewpoint-neutrality" requires an umpire to decide whether the journalist (in this case, Ms. Howarth) completed her task without reference, for example, to the appeal that different candidates' views were likely to have among the general public, or to the relative importance attaching to candidates who espouse the views of a major, rather than a fringe, political party. In the Eighth Circuit's view, that umpire is the federal courts; but judicial supervision of broadcast licensee's programming decisions conflicts with this Court's admonition:

2/ 917 F.2d at 488.

3/ *Id.* at n.2.

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors--newspaper or broadcast--can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.

CBS v. DNC, 412 U.S. at 124-25. Requiring the explication of "viewpoint-neutral" journalistic rationales is hardly compatible with this description of the editing process.

State licensees' journalistic judgments would be meaningless if they could not be based on evaluation of content or viewpoint. In *League of Women Voters* this Court emphasized that "broadcasters are engaged in a vital and independent form of communicative activity," and are "'entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public [duties]."'" 468 U.S. at 378 (citations omitted). In *Chandler*, the Eleventh Circuit recognized that GPTC "'regulated content'" and that its decision not to include candidates in debates was "content-based." 917 F.2d at 489.[4/]

The Eighth Circuit's restrictive view therefore departs sharply from the body of precedent holding that, under Congress' framework for broadcasting and under the First

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4/ Moreover, the Eleventh Circuit concluded that this decision was not "viewpoint restrictive and [did] not violate the First Amendment." *Id.* The *Chandler* court emphasized that, "GPTC chose to air a debate between only the Democratic and Republican candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia." *Id.*

Amendment, state-related public broadcasters[5/] are entitled -- indeed, are obligated -- to exercise the same quality and degree of editorial discretion required under the Communications Act of commercial broadcasters and of public broadcasters that are not licensed to a state or municipal entity.[6/]

5/ In *League of Women Voters*, this Court recognized that "[t]he vast majority of financial support [for public broadcasting] comes. . .from state and local governments," 468 U.S. at 390 n.19, and that "at least two-thirds" of public television stations are licensed to states or state-related entities, *Id.* at 393 n.22.

6/ *See generally League of Women Voters*, 468 U.S. at 397; *Muir*, 688 F.2d at 1040 ("[p]ublic television licensees are generally subjected to the same regulatory requirements as their commercial counterparts. . . .Thus the FCC, in its demand for unfettered licensee control over programming has made no distinction between private and public licensees. . . . The Public Broadcasting Act of 1967. . . .further illustrates a Congressional desire that public broadcast licensees retain independent programming responsibility.") (plurality opinion) (citations omitted); *Community-Serv. Broadcasting*, 593 F.2d at 1110 ("noncommercial broadcasters, no less than their commercial counterparts, are entitled to invoke the protection of the First Amendment and to place upon the Government the burden of justifying any practice which restricts free decisionmaking.") (footnote omitted).

A. Political Debates Under the Communications Act

Section 315(a) of the Communications Act (App. 59a) requires broadcasters to afford "equal opportunities" to legally qualified opponents of candidates who "use" their facilities.[7/] However, if a candidate's appearance falls within any of Section 315's exemptions, including on-the-spot coverage of a bona fide news event, opponents are not entitled to equal opportunities.[8/] In *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976), the court of appeals upheld an FCC ruling (reversing an earlier FCC opinion) that broadcast of candidates' debates was exempt from "equal opportunities" as "on-the-spot coverage." *Id.* at 359. To qualify for the exemption, the debate had to be organized by someone other than a broadcaster and held in a location other than a broadcast studio. *Id.* at 354. The appearance was exempt if the decision to cover it was based on *the broadcaster's good faith, reasonable news judgement*, and not because the broadcaster sought to advance a particular candidacy. *Id.* at 359.

Seven years later, in *Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd, mem., League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984), the FCC expanded the scope of the "on-the-spot" coverage exemption to include debates organized by broadcasters and held in broadcast studios. The FCC declared that, "it is clear that Congress intended to give broadcasters great discretion in their news

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7/ *Political Primer 1984*, 100 F.C.C. 2d 1476, 1489-93 (1984); *see also Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991).

8/ *Political Primer 1984*, 100 F.C.C.2d at 1493, 1500-02.

programming decisions," 95 F.C.C.2d at 1242, and cited *Chisholm* for the proposition that, "'in order to facilitate broadcast coverage of political news, Congress knowingly faced risks of political favoritism by broadcasters, and opted in favor of broader coverage and increased broadcaster discretion.'" *Id.* (quoting *Chisholm*, 538 F.2d at 366).

A candidate not invited to the debate may challenge its exempt status only by adducing evidence of bad faith -- that the licensee intended to advance a particular candidacy instead of basing its broadcast decision on a bona fide editorial judgment. The candidate satisfies this burden by providing "extrinsic evidence"[9/] that the licensee "acted in bad faith or that its motive. . .was to advance. . .[a particular] candidacy."[10/] If the candidate meets the burden, the broadcast is non-exempt, and the candidate is entitled to equal opportunities on the station or network.[11/]

The "extrinsic evidence" standard is significant for two reasons. First, it removes the FCC and the courts from any role in second-guessing the components, or the relative weight of the components, in an editorial decision. It thus brings to the FCC's supervision of Section 315's exemptions a mechanism to preclude agency involvement in the myriad

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9/ *Brown for President Comm.*, 75 F.C.C.2d 609, 613 (1980); *Chisholm*, 538 F.2d at 383-84 nn.78, 79 (Wright, J., dissenting).

10/ *Brown*, 75 F.C.C.2d at 613-14.

11/ *Andrew J. Watson, 26 F.C.C.2d 236 (1970); Constitutional Party and Frank W. Gaydosh*, 14 F.C.C.2d 255 (1968), *rev. denied*, 14 F.C.C.2d 861 (1968); *Conservative Party*, 40 F.C.C. 1086 (1962).

elements of programming judgments -- elements that often are difficult or impossible for an editor to explain fully.

Second, it removes the FCC and the courts from having to infer a discriminatory motive (such as attempting to advance or penalize a particular candidacy) as a step in deciding whether an exemption applies under Section 315(a). Instead, the uninvited candidate must produce evidence of discrimination that is external to the editorial process.

The FCC consistently resolves candidates' complaints under Section 315(a)(4) by analyzing whether the broadcaster exercised good faith news judgment. This is true whether the broadcaster is commercial[12/] or noncommercial and, if the latter, whether a state-related[13/] or a community licensee.[14/] Protection of state broadcast licensees' news judgment -- the good-faith exercise of editorial discretion --

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12/ *Johnson v. FCC*, 829 F.2d 157, 160-63 (D.C.Cir. 1987) (Citizens Party candidates' request to be included in broadcast political debate held "a demand for broadcast access," *and* inconsistent with Congress' decision to promote coverage of political news and first amendment interest in preserving broadcasters' journalistic discretion); *King Broadcasting Co. v. FCC*, 860 F.2d 465 (D.C.Cir. 1988), *on remand, King Broadcasting Co.*, 6 FCC Rcd 4998 (1991).

13/ *Jim Trinity*, Letter, 7 FCC Rcd 3199 (1992) (state university licensee); *Arthur R. Block*, Letter, 7 FCC Rcd 1784 (1992) (community licensee and state university licensee).

14/ *Cyril E. Sagan*, 1 FCC Rcd 10 (1986) (community licensee).

by the courts and the FCC is inconsistent with the Eighth Circuit's holding that AETC articulate "a rational and viewpoint-neutral justification for its determination" not to invite Forbes. (App. 14a.)

Furthermore, under Section 402(a) of the Communications Act, 47 U.S.C. §402(a) (App. 60a), the FCC has *exclusive* jurisdiction to adjudicate application of Section 315(a)'s exemptions in the first instance.[15/] Forbes' addition of a First Amendment claim, supposedly calling for forum treatment, does not change that result. The reason is that a discriminatory motive on the part of a state public broadcast licensee -- a motive to hinder a particular candidacy -- itself contravenes the FCC's requirement that

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15/ Section 315(d), 47 U.S.C §315(d), instructs the FCC to "prescribe appropriate rules and regulations to carry out the provisions" of Section 315. Courts repeatedly hold that the FCC is "the primary and exclusive forum in which to institute and prosecute alleged violations of section 315(a) by broadcast licensees." *Ackerman v. Columbia Broadcasting Sys., Inc.*, 301 F. Supp. 628, 631 (S.D.N.Y. 1969); *see also Lamb v. Griffin Television, Inc.*, 804 F. Supp. 1430, 1431 (W.D. Okla. 1992); *Maher v. Sun Publications, Inc.*, 459 F. Supp. 353, 356 (D. Kan. 1978); *Gordon v. Nat'l Broadcasting Co.*, 287 F. Supp. 452, 455 (S.D.N.Y. 1968) (equal time complaint "fatally defective in that it fails to allege that the plaintiff has availed himself of the primary and exclusive jurisdiction of the Federal Communications Commission"). No private cause of action exists to enforce Section 315. *See, e.g., Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980)("creation of a private cause of action would be inconsistent with the clear legislative intent to centralize enforcement of the Act in the expert agency").

the coverage be based on good-faith journalistic judgment. If the professional programmers at a state public broadcasting licensee were subjected to political pressure to advance or hinder a particular candidacy, the abuse (demonstrated by extrinsic evidence) would be subject to redress; for, by definition, selection of participants in whole or part for political reasons would deprive the debate of its bona fide character under the FCC's interpretations of Section 315(a)(4).

Adjudication under the Communications Act is preferable to application of, for example, *Cornelius*, because the FCC applies the extrinsic evidence standard to protect the First Amendment rights of the broadcaster. Conversely, as the Eighth Circuit's opinion demonstrates, attempting to analyze broadcast stations as fora essentially abandons the licensees' statutory and First Amendment editorial prerogatives.

As Judge Robinson observed in *Community-Serv. Broadcasting*: "[I]t makes no difference whether the governmental action absolutely prohibits a certain category of speech or simply restricts it by imposing additional burdens on those who wish to engage in it." 593 F.2d at 1127 n.16 (citations omitted) (Robinson, J., concurring). This Court in *CBS v. DNC* warned of "the risk of an enlargement of Government control over the content of broadcast discussion of public issues," 412 U.S. at 126, and explained:

> Under a constitutionally commanded and Government supervised right-of-access system. . .the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a

> particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.

Id. at 126-27. See also Johnson, 829 F.2d at 163.

B. Conflict With *Chandler*

Chandler held that GPTC's "content-based decision" to air a debate only between major party candidates was proper under both First Amendment and equal protection analysis, citing *Muir* and *Schneider*. *Chandler*, 917 F.2d at 488-90.

The Eighth Circuit declared: "we respectfully disagree with the Eleventh Circuit's conclusion [in *Chandler*] that the First Amendment was not implicated by the Georgia public television station's actions." (App. 13a n.4.) The Eighth Circuit also sought to distinguish *Chandler*, believing it to be "similar" but noting that, in *Chandler*, the Georgia Public Television Commission offered the candidate thirty minutes of air time to respond to the debate, which, the Eighth Circuit said, "AETN allegedly refused to do for Forbes." *Id.*

The Eighth Circuit's distinction is of no moment because Forbes, a federal candidate, was in any case entitled to request "reasonable access" under Section 312(a)(7),[16/] and

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16/ Every legally qualified *federal* candidate may also request, and the broadcaster must grant, some program time under the "reasonable access" provision. Section 312(a)(7) (continued...)

AETC was obligated to afford him a reasonable amount of program time.[17/] The debate's exemption from "equal opportunities" is thus unrelated to whether Forbes could get air time as a legally qualified candidate.

Rather, the significant issue, common to this case and *Chandler*, is whether the candidate could convince a federal court that he had a First Amendment right to enjoin the debate unless (1) he was included or (2) unless the state broadcast licensee could provide a viewpoint-neutral rationale, comporting with forum analysis, for his exclusion. The conflict is square.

C. Conflict Over Editorial Discretion

The Eighth Circuit's new doctrine has implications reaching far beyond the availability to state public broadcasters of the exemption for on-the-spot coverage of debates among legally qualified candidates. The *Chandler* court recognized this danger: "[W]e could see no principled basis upon which that rule could be limited to the candidate

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16/ (...continued)
(47 U.S.C. §312(a)(7)). This was true of Forbes, whether or not he was entitled to "equal opportunities" as a result of the debate. *Political Primer 1984*, 100 F.C.C.2d at 1479, 1523. On a noncommercial station or network such as AETC's, no charge can be made for the time granted under reasonable access. Forbes would not be entitled to participate in the debate, but rather to be granted program time that he could use as he saw fit, with no censorship by AETC. *Id.* at 1524.

17/ *Supra*, note 11 and accompanying text.

who has obtained a ballot position and not extended to all other serious candidates." *Chandler*, 917 F.2d at 489.

But this new doctrine would not stop with political coverage. Rather, if the Eighth Circuit is correct, *all programming decisions* by state licensees -- state networks; state universities, colleges, and community colleges; municipalities; and school districts -- must, at minimum, be evaluated under the *Cornelius* standard. The reason is that, under *Cornelius*, 473 U.S. at 811, "existence of reasonable grounds for limiting access to a nonpublic forum. . .will not save a regulation that is in reality a facade for viewpoint-based discrimination." (*See* App. 14a.) So every programming judgment is vulnerable to court challenge on the theory that it may be a facade for some discriminatory purpose.

Whether a viewpoint informs selection of news, public affairs, cultural, or entertainment programming, every decision by a state-related public broadcaster would fall under the new doctrine's sweep. Viewers of public television and listeners of public radio would have a doctrinal basis to call into question, in court, virtually any content decision by any state-related public broadcaster. What will be the burden as state licensees are forced to articulate "a rational and viewpoint-neutral justification" (App. 14a) for selecting or rejecting programs on everything from art to zoology?

This was precisely the problem perceived by the Fifth Circuit in holding that state public television licensees in Alabama and Texas were not under a First Amendment obligation to carry the program, "Death of a Princess." In

the opinion, which is the law of the Fifth and Eleventh Circuits,[18/] Judge Rubin reasoned:

> Judicial reassessment of the propriety of a programming decision made in operating a television station involves not only interference with station management but also reevaluation of all of the content-quality-audience reaction factors that enter into a decision to use or not to use a program by a medium that cannot possibly, by its very nature, accommodate everything that every viewer might desire.

Muir, 688 F.2d at 1052 (Rubin, J., concurring).

Similarly, in *Schneider*, where the Eleventh Circuit considered attacks by former station staff members against the editorial policies of the licensee, a community college board, the court declared:

> It is clear that Congress concluded that the First Amendment rights of public television viewers and radio listeners are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest.

875 F.2d at 1541.

The D.C. Circuit perceived a threat to public broadcasters' journalistic discretion from the program recording requirement in former Section 399(b) of the Communications Act, which it struck down on First

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18/ *Schneider*, 875 F.2d at 1541 and n.2.

Amendment and equal protection grounds. *Community-Serv. Broadcasting*, 593 F.2d at 1122-23.[19/] In analyzing the necessity for all of public broadcasting to be free of interference from the federal government, despite the dangers inherent in the federal funding scheme, the D.C. Circuit said:

> [R]ecognition of the risks of program-by-program review is one that has been shared by both the courts and the [FCC]. The FCC has generally eschewed any such review. . .and where it must take place, . . .review has been accompanied by judicially imposed standards and safeguards designed to minimize intrusion on First Amendment values.

Id. at 1115 (citations omitted). The Eighth Circuit, in overruling its earlier decision in *DeYoung* and attempting to regulate a major portion of public broadcasting through forum doctrine, fails to minimize the danger to state licensees' First Amendment rights and, in the process, invites these enormous risks.

19/ *See also League of Women Voters*, 468 U.S. at 370 n.7.

II. The Eighth Circuit's Decision Will Deprive the Public of Important Programming by Preventing or Discouraging State-Owned or -Affiliated Public Television and Radio Stations from Sponsoring and Broadcasting Political Debates

The 1959 amendments to the Communications Act were Congress' response to case law that, as a practical matter, discouraged the broadcast of newscasts, documentaries, interviews, and debates involving political candidates.[20/] The 1959 amendments were designed specifically to increase coverage to enlarge "'the right of the people to be informed through broadcasts of political events.'" [21/]

Congress enacted the exemptions to Section 315 to encourage broadcasters to devote more air time to political events: "By casting the exemptions in terms of broad categories, Congress knowingly accepted the risk of broadcaster favoritism in order to promote wider coverage of political news." *Johnson*, 829 F.2d at 162 (footnote omitted). If the country's state-related public broadcasters cannot rely on their statutory right under Section 315(a)(4) not to invite fringe party candidates to political debates, there will likely be a marked reduction in this kind of programming on public television.[22/] And, because the

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20/ *See generally Chisholm*, 538 F.2d at 356-60.

21/ *Id.* at 358 (citation omitted).

22/ "We cannot, of course, specify with any degree of certainty the precise quantity of chill which is or will be

(continued...)

Eighth Circuit's doctrine logically applies to bona fide newscasts, news interviews, and news documentaries[23/] -- each of which involves content-based editorial decisions that cannot by their nature be viewpoint-neutral -- this kind of political coverage will also be at risk on stations operated by state networks, state colleges and universities, and municipalities.[24/] Public television and radio audiences will be deprived of much of the public broadcasting political coverage on which they have come to depend.

22/ (...continued)
produced. . . . To be sure, where actual instances of harassment are established, or where past experience with similar regulation yields concrete evidence of a successful chill, the case is stronger one, and the burden on government to justify its regulation must be heavier." *Community-Serv. Broadcasting*, 593 F.2d at 1118.

23/ 47 U.S.C. §315(a)(1),(2),(3) (1988).

24/ The issue in this case is "capable of repetition, yet evading review," and is therefore justiciable, because public broadcasters will continue seeking to hold debates among invited candidates, and candidates not invited, using the Eighth Circuit's holding, will have a doctrinal basis for asking that those debates be enjoined or the guest list expanded. *Norman v. Reed*, 502 U.S. 279 (1992); *Johnson*, 829 F.2d at 159 n.7. For that reason, the remand ordered by the Eighth Circuit fails, under the First Amendment and the Communications Act, to answer the threshold question of whether state public broadcasters' editorial judgments should be open to initial challenge in federal court.

Chandler recognizes the risk:

> We are not willing to establish a precedent that would require public television stations to forego the broadcast of controversial views touching upon important public issues--environment, ecology, animal rights, ozone depletion--lest the airing of such programs require the inclusion of a cacophony of differing views on each subject. The values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television.

917 F.2d at 489-90.

Because state-related licensees hold a majority of the public television licenses, and a very significant number of public radio licenses, in this country, the potential impact of the Eighth Circuit's doctrine is enormous. A review of publications from the Corporation for *Public Broadcasting ("CPB")*[25/] reveals that state television networks, such as AETN, operate 135 stations in 24 states. There also are approximately 81 public television stations licensed to state universities and colleges, and another 8 licensed to local government. As this Court recognized in *League of Women Voters*, "[t]he vast majority of financial support [for public broadcasting] comes . . .from state and local governments," 468 U.S. at 390 n.19, and:

> at least two-thirds of the public television broadcasting stations in operation are licensed to (a)

25/ Corporation for Public Broadcasting, PUBLIC BROADCASTING DIRECTORY (1993); PUBLIC BROADCASTING AND YOU (1994) (pamphlet).

> state public broadcasting authorities or commissions, in which commission members are often appointed by the governor with the advice and consent of the state legislature, (b) state universities or educational commissions, or (c) local school boards or municipal authorities.

Id. at 393 n.22 (citations omitted). The proportion of public radio stations licensed to state related entities is similar, based on information from CPB.

This adverse impact on public broadcasting's political coverage is precisely counter to Congress' intent.[26/]

III. The Eighth Circuit's Holding that AETC Must Operate its Network as a Forum Will Thwart State Public Broadcasters' Exercise of Discretion Over All Classes of Programming

The *sine qua non* of a broadcast licensee is the legal capacity to exercise unfettered editorial judgment over programming.[27/] When licensees have failed to retain control over programming, the FCC has denied license

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26/ "Paradoxically, public affairs programming is at the very core of the role envisioned for noncommercial broadcasting." *Community-Serv. Broadcasting*, 593 F.2d at 1135 n.64 (citations omitted)(Robinson, J., concurring).

27/ *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 218 (1943); *Cosmopolitan Broadcasting Co., Inc. v. FCC*, 581 F.2d 917, 921 (D.C.Cir. 1978); *United States Broadcasting Corp.*, 2 F.C.C.2d 208, 225 (1935).

renewal.[28/] The requirement for control over programming applies fully to noncommercial licensees.[29/] Without this capacity, the programming decisions of state public broadcasters nationwide would be vulnerable to constant legal attack in federal court.[30/] As Forbes' challenge demonstrates, in the Eighth Circuit today this is not a hypothetical issue.

The Fifth Circuit, in *Muir*, and the Eleventh Circuit, in *Schneider*, considered at length the First Amendment and equal protection dilemma posed by state public broadcasting licensees.[31/] Both were relied upon in *Chandler* for

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28/ *E.g., Cosmopolitan Broadcasting Corp.*, 59 F.C.C.2d 558 (1976), *recons. denied*, 61 F.C.C.2d 257 (1975), *rev'd on other grounds*, *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917 (D.C.Cir. 1978).

29/ *E.g., Alabama Educ. Television Comm'n*, 33 F.C.C.2d 495, 508 (1972), *modified*, 50 F.C.C.2d 461 (1975); *Trustees of the Univ. of Pennsylvania (WXPN)*, 69 F.C.C.2d 1394, 1420 (1978); *Southwest Texas Pub. Broadcasting Council*, 85 F.C.C.2d 713 (1984).

30/ A challenge, not involving political candidates, to the exercise of license programming discretion at a noncommercial radio station licensed to the University of Washington was recently decided by the United States District Court for the Western District of Washington. *Aldrich v. Knab*, No. C93-3Z (W.D. Wash. July 19, 1994), *rev'd on other grounds*, 1994 U.S.App. LEXIS 23843 (9th Cir. Aug. 4, 1994) (Eleventh Amendment bars suit naming state university rather than its officers as defendants).

31/ *Chandler*, 917 F.2d at 488 & n.3.

guidance as to the "the extent of discretion a public broadcast licensee can exercise consistent with the First Amendment."[32/] All three cases rely on Judge Rubin's view:

> Licensing is not destiny. That the state is the licensee does not predetermine the station's function. The state may elect the station's mission, so long as this mission is consistent with the station's license and the Constitution. The prerogatives of managers, editors, and programmers, the rights of access of those who seek exposure, and the rights of viewers, as well as the prerogatives of the licensee itself as a state agency, are at least in large part determined by this mission.

Muir, 688 F.2d at 1049. In *Chandler*, the Eleventh Circuit analyzed GPTC in Judge Rubin's framework:

> GPTC is "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia." . . .Further, as a public television station, GPTC is under an obligation to serve the public interest. . . . GPTC's employees make editorial decisions on a daily basis determining which programs to air in order to meet the needs and interests of Georgia's citizens. Obviously a decision to broadcast one program excludes, for that time, all other programs.

917 F.2d at 488 (references and footnote omitted).

32/ *Id.* at n.3.

AETC fits this mold. AETC's mission is to "[make] the benefits of educational television available to and [promote] its use by inhabitants of Arkansas," and for that purpose AETC is "charged with the duty of controlling and supervising the use of channels reserved by the [FCC] to Arkansas for noncommercial educational use."[33/]

Yet, if the Eighth Circuit's approach is correct, AETC may no longer have the legal capacity either to comply with its organic statute or to fulfill the most basic licensing requirement of the FCC, namely, to control its programming via the exercise of programming discretion.[34/] If, indeed, state licensees are required to appear in federal court to furnish "a rational and viewpoint-neutral justification" for every programming determination that is challenged by a disgruntled viewer, listener, or candidate, the practical effect will be to mire programming and journalistic processes beyond use.

Startling as this consequence may seem, it flows directly from the Eighth Circuit's opinion. Its potential effect is most palpable for state-related public broadcast licensees within the Eighth Circuit, but may well affect licensees in circuits other than the D.C., Fifth, and Eleventh. In the meantime, the chill on state-related public broadcasters'

33/ ARK. CODE ANN. §§ 6-3-105(a),(c) (Michie 1993) (App. 50a).

34/ A concomitant legal conclusion might well be that state-related entities are disqualified under the First Amendment from exercising control over programming and are, therefore, incapable of meeting the Communications Act's requisites to remain licensees.

editorial freedoms under the Communications Act and the First Amendment is all too real.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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September 16, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1031WA

Ralph P. Forbes, and the People,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	
Arkansas Educational Television Communication Network Foundation, and its Board of Directors in their official capacities; Arkansas Education Telecommunications, and its members and officers; Susan J. Howarth, in her official capacity as Executive Director; Victor Fleming, in his official capacity as Chairman; G.E. Campbell, in his official capacity as Vice-Chairman; Dr. Caroline Whitson, in her official capacity as Secretary; Diane Blair, in her official capacity as Commissioner; S. McAdams, in his official capacity as Commissioner; James Ross, in his official	*	On Appeal from the United States District Court for the Western District of Arkansas.

capacity as Commissioner; *
Jerry McIntosh, in his official *
capacity as Commissioner; *
Lillian Springer, in her official *
capacity as Commissioner; Amy *
L. Oliver, in her official *
capacity as Production Manager; *
Bill Clinton, in his official *
capcity as Governor of the State of *
Arkansas; and John Does; *
KHBS-TV/Channel 40 UHF; *
KHOG-TV/Channel 29 UHF; *
American Broadcasting Company; *
Darrel Cunningham, in his *
individual capacity, *
*

Appellees.

Submitted: August 31, 1993

Filed: April 28, 1994

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

The petitioner, Ralph Forbes, appeals the District Court's dismissal of his complaint for failure to state a claim upon which relief can be granted. Forbes raises two issues. First, does a private television station violate the Federal Communications Act by deciding to air a political advertisement during "safe harbor" hours without first determining whether that ad is "indecent"? Second, does a political candidate who has qualified to be on the ballot have a right to be included in a debate sponsored by a public television station or, in the alternative, a right to equal access under 47 U.S.C. § 315[1/], when the other candidates are included? Relying on this Court's holding in *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), the District Court concluded that neither claim had merit, that the

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1/ 47 U.S.C. § 315(a) provides that any person legally qualified as a candidate for public office shall be afforded the same opportunities as all other candidates for that office. However,

> No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary . . . or
> (4) on-the-spot coverage of bona fide news events . . .
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

47 U.S.C. § 315(a).

Communications Act cannot be enforced through a § 1983 action, and that Forbes had failed to state a claim under 42 U.S.C. § 1981, § 1985, or the First and Fourteenth Amendments. We now affirm in part and reverse in part.

I.

In 1992, Ralph Forbes was an independent candidate for United States Representative for the Third Congressional District of Arkansas. He had obtained enough signatures to qualify for the ballot under state law. One of the defendants, the Arkansas Educational Television Network (AETN), is an instrumentality of the State of Arkansas. The other defendants are private television stations that broadcast in the Third Congressional District.

A few weeks before the general election on November 3, 1992, Forbes sued AETN and its agents (collectively the AETN defendants) alleging that AETN planned to sponsor a debate among the candidates for the Third Congressional District seat, but that it intended to include only the two major-party candidates. Forbes alleged that since he had qualified for the ballot as an independent candidate, he had a right to be included in the debate or, in the alternative, a right to additional air time on AETN to express his views, as required by the equal-time provision of 47 U.S.C. § 315. He claimed that AETN had denied him access to air time because of his political beliefs. Forbes also alleged that AETN's actions were taken in violation of 42 U.S.C. § 1981 *et seq.*, and that his First Amendment rights had been violated. Finally, Forbes alleged that his exclusion from the debates had deprived "the people" of their right to vote, and he sought declaratory and injunctive relief as well as compensatory and punitive damages.

Forbes alleged that he asked AETN to include him in the debate or give him additional time, and that his request was refused. He than telephoned the Federal Communications Commission and claimed that an FCC representative told him to "go through the motions" of a proper complaint, although it would be a waste of time. Believing that pursuit of his claim through the FCC would be pointless, Forbes wrote the FCC to request that his complaint be denied speedily so that he could seek an injunction in court. Instead, the FCC responded with a letter enclosing a statement of applicable law as well as instructions on how to file a complaint with the FCC. Forbes claims that he never received the enclosed materials, although he acknowledges receipt of the letter.

Forbes then sought injunctive relief in the District Court and moved for a preliminary injunction to mandate his inclusion in the debate. He alleged that AETN's reasons for excluding him from the debate were discriminatory and were specifically designed to keep the public from learning of Forbes's views on certain policy issues. In support of this position, Forbes claimed that an official of AETN stated that the network would run "St. Elsewhere" rather than a debate that included Forbes, and that another official of AETN stated that Forbes had not been included because he was not a "serious" candidate.

The District Court denied the request for injunctive relief on October 20, 1992. On October 21, 1992, sitting as a single circuit judge, the writer of this opinion denied Forbes's request for an injunction pending appeal. The next day, a panel of this Court declined to disturb that action. The basis for both rulings - that of the panel and that of the single judge - was that *DeYoung v. Patten*, *supra*, was

controlling Circuit precedent and directly in point against Forbes.

On November 2, the day before the election, Forbes amended his complaint to include private television stations KHBS-TV and KHOG-TV, the American Broadcasting Company, and their agent, Darrel Cunningham (collectively "the private stations"), as defendants. In his amended complaint, Forbes alleged that the private stations had violated the provisions of the Communications Act by refusing to air one of his anti-abortion advertisements except during the "safe-harbor" hours of 11:00 p.m. to 6:00 a.m. without first making a determination that the ad was indecent. Forbes alleged a criminal conspiracy, "RICO treble damages," and violations of 42 U.S.C. § 1981 *et seq.*, and claimed the private stations' actions also were in violation of 47 U.S.C. § 315. He renewed his claims against AETN defendants.

The AETN defendants filed a Rule 12(b)(6) motion, arguing that Forbes had no First or Fourteenth Amendment right to appear in a televisions debate, that he had no personal claim or cause of action under 47 U.S.C. § 315 to appear on television, that he failed to state a claim under 42 U.S.C. § 1981, and that he failed to state a cause of action against the AETN defendants. The private stations also moved for dismissal under Rule 12(b)(6), arguing that the District Court had no subject-matter jurisdiction under the Communications Act, and that Forbes has failed to exhaust his administrative remedies. The District Court, after properly setting forth the standard for granting a Rule 12(b)(6) motion, concluded that the standard had been met by both sets of defendants. It concluded, following this Court's holding in *DeYoung v. Patten*, *supra*, that Forbes had no right of access to the public airways, that no implied

right of action exists under the Communications Act, and that § 1983 cannot be used to enforce the rights granted by 47 U.S.C. § 315. Additionally, the Court concluded that the complaint contained only vague allegations of conspiracy that failed to state a claim under 42 U.S.C. § 1985.

II.

In reviewing a dismissal for failure to state a claim, we take the allegations well pleaded in the complaint as true. Motions to dismiss should not be granted unless it is clear beyond doubt that there is no set of facts the plaintiff could prove that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Forbes has raised three claims in his complaint. First, as against both the AETN defendants and the private stations, Forbes has claimed violations of 47 U.S.C. § 315 and a conspiracy under 42 U.S.C. § 1985. Second, Forbes has additionally claimed against AETN a § 1983 violation for failing to provide him with equal time as required by § 315. Finally, Forbes has alleged that AETN violated the First and Fourteenth Amendments by failing to include him in the debate.

A. Statutory Claims

First, with respect to Forbes's statutory claim, we agree with the District Court and the private stations that Forbes's complaint cannot stand. There is no private cause of action to enforce 47 U.S.C. § 315, and Forbes's proper course of action is to bring his claim before the Federal Communications Commission. Forbes failed to exhaust his administrative remedies; therefore, his claim that the private stations improperly refused to run his anti-abortion advertisement outside of safe-harbor hours was not properly before the District Court. Additionally, Forbes's claim that

AETN improperly refused to grant him equal time, as required by § 315, likewise should have been brought before the FCC first and then appealed, if necessary, to a court of competent jurisdiction. See *DeYoung*, 898 F.2d at 633-35. (We adhere to this aspect of *DeYoung*.) Since Forbes has failed to exhaust his administrative remedies, the District Court was correct in declining to rule on his statutory claims.

We further agree with the District Court that there is insufficient substance to Forbes's conspiracy claim to entitle him to relief under 42 U.S.C. § 1985. We also affirm the District Court's ruling that the failure to allege racial discrimination bars his claim under § 1981. Finally, we agree with the District Court that § 1983 is not available to enforce Forbes's claims under § 315 of the Communications Act, since that provision itself contains the remedy for its violation - a petition to the FCC. Nonetheless, we disagree with the District Court with regard to Forbes's constitutional claims, and now hold that Forbes did allege a First Amendment violation well enough to survive a motion to dismiss. We now turn to this claim.

B. First Amendment Claim

The District Court dismissed Forbes's First Amendment claim on the authority of this Court's holding in *DeYoung*, 898 F.2d 632, that "[a] political candidate does not have a 'constitutional right of broadcast access to air his views.'" *Id.* at 632, quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. Cir. 1980). The Court concluded that the only claim Forbes had to warrant his inclusion in the debate was under the equal-time provision of the Communications Act. Since there was no private right of action under the Communications Act, nor was § 1983

available to enforce its provisions, Forbes's only remedy was through the FCC. Letter from the District Court to All Counsel of Record at 4, citing *DeYoung*, 898 F.2d at 634.

Generally speaking, it is true that a candidate does not have the right to demand air time. See *Kennedy for President Comm.*, *supra*.[2/] Under the circumstances of the present case, we hold that Forbes did have a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny. In *DeYoung*, this Court concluded that a public television station, such as AETN, was a state actor. *DeYoung*, 898 F.2d at 631-32. We adhere to this conclusion. AETN is not a private entity, it is a state-owned television network, therefore, actions taken by the station, as well as actions taken by its employees and representatives, are fairly

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2/ In *Kennedy*, the FCC had denied a candidate's request for an opportunity to respond to the President's statements in a press conference. Since the press conference was a bona fide news event, and, therefore, the equal-time provision of the Communications Act was not triggered, the candidate argued that he had a First Amendment right to respond. The Court concluded that since there was no absolute right of access to the airways, the provisions of § 315 excluding bona fide news events from its requirements was not in violation of the First Amendment. *Kennedy*, 636 F.2d at 432. As a general rule, we agree with this principle - there is no First Amendment right to appear on television upon demand. However, the stations involved in *Kennedy* were private stations. See *Id.* at 419-20. In the present case, the fact that AETN is a public station and did, Forbes alleges, sponsor its own debate alters the analysis significantly.

attributable to the State and subject to the Fourteenth Amendment, unlike the actions of privately owned broadcast licensees.

As a state actor, AETN is faced with constraints not shared by other television stations. When it comes to the First Amendment claim, we conclude that *DeYoung* was wrongly decided. *DeYoung* holds that no First Amendment right to appear in a televised debate exists, at least beyond that given by § 315, *DeYoung*, 898 F.2d at 633-35, and that the only remedy available to a candidate in Mr. Forbes's position is to seek remedial action through the FCC. This holding would allow a state-owned station to exclude all Republicans, or all Methodists, or all candidates with a certain point of view, except to the extent, if any,[3/] that the excluded candidates could obtain relief under the Communications Act. We believe the error of such a proposition is self-evident. The state may not, by statute or otherwise, take such a discriminatory action, absent a compelling state interest.

The AETN defendants suggest that the case should be governed by public-forum analysis. If it is, the same conclusion follows: a state agency does not have an absolute right to determine which of the legally qualified candidates for a public office it will put on the air. The reason for such

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3/ Regardless of the sponsor, the FCC has allowed non-inclusive debates to be broadcast over public stations. See *In re Sagan*, 1 FCC Rcd 10 (1986). The deference we give administrative agencies on questions of statutory interpretation does not extend to constitutional issues. See *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486, 492 n.4 (Clark, J., dissenting), *cert. denied*, 112 S.Ct 71 (1991).

an exclusion must be ascertained and measured against First Amendment standards.

In its discussions of public versus nonpublic fora, the Supreme Court has divided government property into roughly three categories. The first is the traditional public forum, such as the town square, "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry Education Assn. v. Perry Local Engineers' Assn.*, 460 U.S. 37, 45 (1983). Public television stations do not fit into this category - there is no unlimited right of access to the airwaves. The second category is the limited public forum, a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), a limited topic, or a limited class of speakers. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Since the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes, it is certainly possible that AETN created a limited public forum when it chose to sponsor a debate among the candidates for the Third Congressional seat. This is a determination the fact finder would have to make after carefully looking at the nature of the debate forum. If it were determined that AETN had created a limited public forum, then Forbes would have a First Amendment right to participate in the debate and could be excluded only if AETN had a sufficient government interest. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry*, 460 U.S. at 45.

The third category of governmental property is the nonpublic forum, which consists of property not usually compatible with expressive activity. See *Cornelius v.*

NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985). Even in the context of the nonpublic forum certain minimum First Amendment requirements apply:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. at 806 (citations omitted). Since Forbes was a member of the class of speakers for whose benefit the debate was held (candidates for the Third Congressional seat), and he wished to address the topic encompassed by the debate (who should be elected to Congress), if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights.[4/] See *Gay & Lesbian Students*

4/ AETN and the Public Broadcasting System amici cite other circuits which they say have concluded otherwise. Most significantly, they cite *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987); *Chandler v. Georgia Public Telecommunications Comm'n.*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991); and *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033

(continued...)

Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988) (while there is no First Amendment right to receipt of public school funds, a state school is not permitted to refuse funding because it disagrees with an organization's message). It should be noted that the Public Television Station amici acknowledge that AETN does not have the right to exclude Forbes simply because they disagree with his point of view. Certainly, were the answer otherwise, there would be nothing to prevent the party in power from excluding all opposing parties, or particular religions, or minorities from public-television-sponsored debates.

4/ (...continued)
(5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). These cases do not precisely address the case before us. *Chandler* involved a factual situation similar to that in the case at bar; however, the Georgia Public Telecommunications Commission had offered the candidates there thirty minutes of air time to respond to the debate from which they were excluded, something AETN allegedly refused to do for Forbes. Additionally, we respectfully disagree with the Eleventh Circuit's conclusion that the First Amendment was not implicated by the Georgia public television station's actions. See *Chandler*, 917 F.2d at 490-94 (Clark, J., dissenting). *Muir* did not involve a debate at all, but rather an attempt by Alabama and Texas public television viewers to force their public television stations to air a particular show. *Muir* correctly assesses the right of the public to have access to air time, but does not address the situation facing us here. *Johnson* involved a broadcast debate sponsored by a third party, not by a public television station.

III.

AETN has not filed an answer to Forbes's complaint; therefore, it has not yet articulated any principled reason for excluding Forbes. See *Cornelius*, 473 U.S. at 811 ("existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination"). AETN must provide a rational and viewpoint-neutral justification for its determination. On this record, AETN has not yet done so; therefore, Forbes has stated a claim upon which relief can be granted, especially if we credit Forbes's allegation, as we must in reviewing a Rule 12(b)(6) dismissal, that AETN planned to air "St. Elsewhere" rather than allow Forbes to debate.

So much of the judgement as dismissed Forbes's statutory claims is affirmed. So much of the judgement as dismissed his claim under the First and Fourteenth Amendment for failure to state a claim is reversed, and the cause is remanded for further proceedings consistent with this opinion. That portion of *DeYoung v. Patten* which holds that the First Amendment places no restraint, beyond that imposed by the Communications Act, on the right of state agencies to sponsor candidate debates and pick and choose which candidates may take part, is overruled.[5/]

It is so ordered.

5/ Our holding applies only to debates that are sponsored by state instrumentalities. It does not apply to private-television-sponsored debates, nor to debates sponsored by third parties that are reported in good faith by public television stations.

McMILLIAN, Circuit Judge, joined by JOHN R. GIBSON, Senior Circuit Judge, FAGG, MAGILL, and HANSEN, Circuit Judges, concurring in part in dissenting in part.

Although I agree with most of the majority opinion, for the reasons discussed below, I would affirm the order of the district court dismissing Forbes's complaint. Accordingly, I concur in part and dissent in part.

It has been an instructive experience to reconsider these issues. As a preliminary matter, however, I would hold that the FCC has exclusive jurisdiction of this litigation, including both the statutory and the constitutional claims, with the judicial review in the court of appeals and then the Supreme Court. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); *see also Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Forbes should have taken his complaints to the FCC in the first instance. Litigation in the district court is inconsistent with and necessarily undermines the exclusive jurisdiction of the FCC.

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved [since 1927] . . .

. . . The judgment of the Legislative Branch cannot be ignored or undervalued simply because [Forbes has cast his] claims under the umbrella of the First Amendment. That is not to say that we "defer" to the judgement of the Congress and the [Federal Communications] Commission on a

constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression.

Columbia Broadcasting System, Inc. v. Democratic National Comm., 412 U.S. at 102-03.

It may be true that the FCC is not as vigilant or as sensitive to first amendment interests as it should be. *See Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033, 1056-57 (5th Cir. 1982) (banc) (Frank M. Johnson, Jr., J., dissenting), *cert. denied*, 460 U.S. 1023 (1983). It may also be true that technological changes since the Supreme Court decided *Red Lion Broadcasting Co. v. FCC* in 1969 have largely undermined the basis for the existing pervasive federal regulation of the broadcasting industry as a whole and, as a result, "raise a significant possibility that the First Amendment balance struck in *Red Lion* would look different today." *See Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442 (8th Cir. 1993) (banc) (Richard S. Arnold, C.J., concurring in the judgment). However, absent such developments, I would require Forbes to raise both his statutory and constitutional claims in proceedings before the FCC and not as an original matter in the district court.

Assuming the district court did have jurisdiction, I agree the district court correctly dismissed Forbes's 42 U.S.C. § 1985 civil conspiracy claim because his allegations were too vague and his 42 U.S.C. § 1981 claim because he failed to allege discrimination on the basis of race. Slip op. at 7. I also agree the district court correctly dismissed Forbes's Federal Communications Act claims against the AETN defendants for excluding him from the debate and for refusing him air time and against the private stations for

refusing to broadcast his political advertisements except during the safe-harbor hours. *Id.* at 6. The district court lacked subject matter jurisdiction over these claims. Forbes should have taken these complaints to the FCC first. Forbes did not do so. The FCC has considered complaints involving candidate debates as well as complaints involving anti-abortion advertisements. Then, had the FCC ruled against him, Forbes could have sought judicial review in the court of appeals, not the district court. *DeYoung v. Patten*, 898 F.2d 628, 633-34 (8th Cir. 1990) (no implied private right of action). I also agree that Forbes cannot use 42 U.S.C. § 1983 to enforce these statutory claims. Slip op. at 7; *DeYoung v. Patten*, 898 F.2d at 634-35 (§ 1983 remedy foreclosed by comprehensive enforcement mechanism).

With respect to Forbes's first amendment claim, I also agree that there is state action for the purposes of § 1983 because AETN is an instrumentality of the state. It is a state-owned, non-commercial, public television station; its employees are state employees who are represented in this appeal by the state attorney general. Slip op. at 8; *DeYoung v. Patten*, 898 F.2d at 631-32. I do not agree, however, that Forbes, even though he was a legally qualified candidate, had a first amendment right to be included in the candidate debate or that the candidate debate was a public forum for first amendment purposes. In my view, the candidate debate was a nonpublic forum. Like private commercial television, public television is not a traditional public forum; it does not extend a general invitation to the public to appear on or participate in its programs. Nor do I think the candidate debate was a limited or quasi-public forum; the format of this candidate debate was not compatible with either unrestricted public access or with unrestricted access by all of the legally qualified candidates. For this reason, I would hold that the candidate debate was a nonpublic forum.

"Control over access to a nonpublic forum can be based on . . . speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985) (citations omitted). Presumably, AETN decided to limit the number of candidates in order to maintain a traditional debate format, rather than to expand the format to a panel discussion. Because AETN has yet to file an answer, AETN's reasons for designing the format of the candidate debate as it did are not known. However, it would not have been unreasonable or viewpoint-specific for AETN to have limited the candidate debate to only the two major party candidates, thus excluding minor party candidates and independent candidates, or, for that matter, to the two candidates who had the most support or who appeared to have the most likely chance of winning, for example, on the basis of poll results. It may not have been good programming, or even good politics, given voters' interest in and the occasional historical success of minor party and independent (and even fringe) candidates, to limit the candidate debate to the two major party candidates. Nonetheless, I would hold that AETN had the editorial and programming discretion to structure the candidate debate along those lines and that excluding Forbes from the candidate debate for those reasons would be viewpoint neutral.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1031WAFS

Ralph P. Forbes, and The People,	*	
Appellant,	*	
vs.	*	Appeal from the United States District Court
Arkansas Educational Television Commission Network Foundation, etc., et. al.,	*	for the Western District of Arkansas
Appellees.	*	

The petition for rehearing by the appellant is denied.

June 21, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gens
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1031WAFS

Ralph P. Forbes, and The People,	*	
Appellant,	*	
vs.	*	Appeal from the United States District Court
Arkansas Educational Television Commission Network Foundation, etc., et. al.,	*	for the Western District of Arkansas
Appellees.	*	

The Court's order of June 14, 1994, is vacated. The petition for rehearing by the appellees is denied.

June 21, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gens
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 93-1031WA

Ralph P. Forbes, and the People,	*	CIVIL CASE NO.92-2190
	*	
Appellant,	*	
	*	
Arkansas Educational Television Communication Network Foundation, and its Board of Directors in their official capacities; Arkansas Education Telecommunications, and its members and officers; Susan J. Howarth, in her official capacity as Executive Director; Victor Fleming, in his official capacity as Chairman; G.E. Campbell, in his official capacity as Vice-Chairman; Dr. Caroline Whitson, in her official capacity as Secretary; Diane Blair, in her official capacity as Commissioner; S. McAdams, in his official capacity as Commissioner;	* * *

James Ross, in his official capacity as Commissioner; Jerry McIntosh, in his official capacity as Commissioner; Lillian Springer, in her official capacity as Commissioner; Amy L. Oliver, in her official capacity as Production Manager; Bill Clinton, in his official capacity as Governor of the State of Arkansas; and John Does; KHBS TV/Channel 40 UHF; KHOG TV/Channel 29 UHF; American Broadcasting Company Darrel Cunningham, in his individual capacity,

Appellees.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, reversed in part and remanded to the district court with directions for proceedings consistent with the opinion of this Court.

April 28, 1994

A true copy.

Attest: /s/ Michael E. Gens
Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1031WAFS

Ralph P. Forbes, and The People,	*	
Appellant,	*	
vs.	*	Appeal from the United States District Court for the Western District of Arkansas
Arkansas Educational Television Commission Network Foundation, etc., et. al.,	*	
Appellees.	*	

The petition for rehearing by the panel filed by the appellees is denied.

June 14, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gens
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

UNITED STATES COURT of APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3374WA

Ralph P. Forbes, People,	*	
Appellant,	*	
v.	*	
Arkansas Educational Television Communication Network Foundation, and its Board of Directors in their official capacities; Arkansas Education Telecommunications, and its members and officers; Susan J. Howarth, in her official capacity as Executive Director; Victor Fleming, in his	*	On Appeal from the United States District Court for the Western District of Arkansas.
	*	(Published)

official capacity as Chairman; G.E. Campbell, in his official capacity as Vice-Chairman; Dr. Caroline Whitson, in her official capacity as Secretary; Diane Blair, in her official capacity as Commissioner; S. McAdams, in his official capacity as Commissioner; James Ross, in his official capacity as Commissioner; Jerry McIntosh, in his official capacity as Commissioner; Lillian Springer, in her official capacity as Commissioner; Amy L. Oliver, in her official capacity as Production Manager; Bill Clinton, in his official capacity as Governor of the State of Arkansas; and John Does,

Appellees.

Filed: December 22, 1992

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN and JOHN R.
GIBSON, Circuit Judges.

PER CURIAM.

This case is before us on petition for rehearing. This appeal, which involves only the question of preliminary injunctive relief, has become moot. The debate in question has been held, and it is no longer possible for the grant or denial of preliminary injunctive relief with respect to it to have any meaning.

Accordingly, the appeal is dismissed as moot. This cause is remanded to the District Court with instructions to vacate its order, denying preliminary injunctive relief on the merits, and to enter a new order, denying the motion for preliminary injunction as moot.

The underlying case is not moot. The complaint contains a prayer for money damages. The District Court should proceed to determine the case and enter final judgment, following which any party aggrieved is at liberty to file a new notice of appeal. See *McFarlin v. Newport Special School District*, No. 92-1570 (8th Cir. December 3, 1992).

The petition for rehearing is denied as moot. A separate order will be entered on the suggestion for rehearing en banc.

It is so ordered.

A true copy.

Attest: /s/ Michael E. Gens

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

APPENDIX G

UNITED STATES COURT of APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3374WA

Ralph P. Forbes,	*	
	*	
Appellant,	*	
	*	
v.	*	On Appeal from the United
	*	States District Court
Arkansas Educational	*	for the Western District
Television Communication	*	of Arkansas.
Network Foundation,	*	
et al.,	*	
	*	
Appellees.	*	

Filed: October 22, 1992

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN and JOHN R.
GIBSON, Circuit Judges.

PER CURIAM.

The panel has before it the request of appellant that we review the order entered yesterday by Chief Judge Arnold, sitting as a single circuit judge.

We have considered the relevant materials, including the order of the District Court. Both the District Court and Chief Judge Arnold considered themselves bound by *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990). So do we. This case is dispositive and is precedent binding on this panel.

The motion for injunction pending appeal is denied. The panel declines to set aside the order entered by Chief Judge Arnold as a single circuit judge. The order of the District Court, denying preliminary injunctive relief, is summarily affirmed. We direct that our mandate be issued forthwith.

The appellant Forbes is of course at liberty to file a timely petition for rehearing with suggestion for rehearing en banc. It will not be practical, however, for such a petition to be ruled on today. Accordingly, the defendants are free to proceed with the televised debate tonight in accordance with their plans.

It is so ordered.

A true copy.

Attest: /s/ Michael E. Gens

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3374WA

Ralph P. Forbes,	*	
	*	
Appellant,	*	
	*	On Motion for Injunction
v.	*	Pending Appeal from the
	*	United States District
Arkansas Educational	*	Court for the Western
Television Communication	*	District of Arkansas.
Network Foundation,	*	
et al.,	*	
	*	
Appellees.	*	

Filed: October 21, 1992

Before RICHARD S. ARNOLD, Chief Judge.

ORDER

This matter was heard in chambers by me as a single circuit judge, upon the application of the appellant for

injunctive relief pending appeal. After a full argument and discussion of all of the issues, I denied the motion. The reasons are fully stated on the record, and a transcript of the proceedings, including the reasons for the decision, is available to either side by arrangement with the Court Reporter.

The most important point, in my view, is that the plaintiff-appellant has only a small chance of prevailing on the appeal, under the controlling precedents of this Court, especially *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990). This case appears to be a conclusive precedent against most of the appellant's theories, and it of course binds me, as it bound the District Court.

I have instructed the Clerk to submit the matter of injunctive relief pending appeal to a panel of three judges, including me. The panel will endeavor to rule on the question before the television debate in question, which is scheduled for 7:00 p.m. on the evening of Thursday, October 22, 1992. I have explained to both sides that my ruling is provisional only, and that the panel can overturn it.

Motion denied.

/s/ Richard S. Arnold
Richard S. Arnold, Chief Judge
United States Court of Appeals
for the Eighth Circuit

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RALPH P. FORBES AND THE PEOPLE PLAINTIFFS

v. Civil No. 92-2190

The ARROGANT ORWELLIAN BUREAUCRATS of the ARKANSAS EDUCATIONAL TELEVISION COMMISSION, and its BOARD OF DIRECTORS in their official capacities; KHBS TV CHANNEL 40; KHOG TV CHANNEL 29 and DARRELL CUNNINGHAM, in his individual capacity; et al. DEFENDANTS

ORDER

On this 16th day of December, 1992, upon consideration of defendants' motions to dismiss, the court finds for the reasons set forth in a letter of even date that said motions should be and hereby are granted and this case is dismissed with prejudice.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RALPH FORBES — PLAINTIFF

v. Civil No. 92-2190

THE ARROGANT ORWELLIAN BUREAUCRATS, ET AL. — DEFENDANTS

ORDER

On this 29th day of July, 1994, came on for consideration the defendants' motion to stay this action. Plaintiff has failed to respond to the motion in the time allowed by the Local Rules for the Eastern and Western Districts of Arkansas.

Defendants request that this action be stayed pending the Supreme Court's action on a petition for certiorari defendants intend to file. The court finds said motion should be and hereby is granted. The defendants are ordered to file the petition as expeditiously as possible and to keep the court apprised of any action taken by the Supreme Court on the petition.

This case is hereby stayed and administratively terminated without prejudice to the right of the parties to reopen the proceedings after the Supreme Court has taken action on the petition for writ of certiorari.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FOR SMITH DIVISION

RALPH P. FORBES PLAINTIFF

v. Civil No. 92-2190

KHBS TV CHANNEL 40, ET AL. DEFENDANTS

ORDER

On this 14th day of January, 1993, upon consideration of the plaintiff's motion to proceed in forma pauperis, the court finds said motion should be and hereby is denied. Pursuant to 28 U.S.C. § 1915 the court finds that the appeal is not taken in good faith.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

APPENDIX L

December 16, 1992

Ralph P. Forbes
Box 88
London, Arkansas 72847

Thomas S. Gay
Senior Assistant
Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201-2610

Mr. Robert L. Jones, III
Jones, Gilbreath, Jackson & Moll
401 North 7th Street
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Fort Smith, Arkansas 72902-2023

RE: *Ralph P. Forbes and the People v. The Arrogant Orwellian Bureaucrats, et. al.*
Civil No. 92-2190

Gentlemen:

Currently before the court is a motion to dismiss filed by separate defendants Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver and William Clinton, sued in their official capacities as members and officers of the Arkansas Educational Telecommunications Network by plaintiff Ralph Forbes. Also before the court for consideration is a motion

to dismiss filed by separate defendants KHBS TV Channel 40, KHOG TV Channel 29, and Darrell Cunningham, sued in his individual capacity by Forbes. The court has considered these motions and the response thereto filed by Mr. Forbes and is now ready to rule. For the reasons set forth below, the defendants' motions to dismiss should be and are hereby granted.

Ralph P. Forbes was an independent candidate for the office of United States Representative for the 3rd Congressional District of Arkansas. Forbes initiated this action on October 19, 1992, just weeks before the November 3, 1992 presidential and congressional election, alleging that the AETN separate defendants planned to unlawfully and unconstitutionally exclude him from a congressional debate to be sponsored and broadcast by AETN on Thursday, October 22, 1992. On behalf of himself and his constituents, Forbes alleged that the AETN defendants unlawfully closed down polling places in counties he carried in the 1990 election, tampered with the voting process in an attempt to defeat him, and denied his access to public facilities for expression of his political beliefs. Forbes alleged that his exclusion from the debate, coupled with actions taken by the defendants, deprived Forbes and his constituents their rights to vote under 42 U.S.C. § 1981. Forbes sought declaratory and injunctive relief plus compensatory and punitive damages.

Forbes then requested an "emergency temporary restraining order with demand for accelerated consideration and expedited injunctive relief" to enjoin defendants from barring his participation in the October 22nd debate. By order on October 20, 1992, this court denied Forbes' request for injunctive relief. Forbes appealed the decision to the Court of Appeals for the Eighth Circuit, and on October 21,

1992, Judge Richard S. Arnold made the provisional ruling that the district court, pursuant to *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), correctly had denied injunctive relief. On October 22, 1992, Judges Arnold, McMillian and Gibson reviewed the order entered by Judge Arnold on the previous day. The panel found that *DeYoung* was binding precedent and dispositive of the matter, and affirmed the decisions of the district court and Judge Arnold.

On November 2, 1992, Forbes amended his complaint to include commercial television broadcasting stations KHBS TV Channel 40, its affiliate KHOG TV Channel 29, the American Broadcasting Company (ABC), and their agent Darrell Cunningham, in his individual capacity. Forbes additionally alleged that these defendants refused to air his political Pro-Life advertisements at any time other than the "safe harbor" hours between 11:00 p.m. and 6:00 a.m. in violation of 42 U.S.C. § 1981 and the First and Fourteenth Amendments to the United States Constitution.

The separate defendants have filed a Rule 12(b)(1), (2) and (6) motion to dismiss this action, asserting that the court lacks subject matter and personal jurisdiction under the Eleventh Amendment. Defendants also assert that plaintiff (1) has no First or Fourteenth Amendment right to appear on a public television debate; (2) has no personal claim or cause of action under the Federal Communications Act to appear on a public television political debate; and (3) has failed to state a claim under 42 U.S.C. § 1981. Defendants additionally assert that Forbes does not share an injury with the members of the purported class pursuant to Rule 22 of the Federal Rules of Civil Procedure, that Forbes has failed to state a cause of action against separate defendants Oliver and Clinton, and that the issues raised by Forbes have become moot by the passage of the election.

Defendants KHBS, KHOG and Darrell Cunningham have also filed a Rule 12(b)(1) and (6) motion to dismiss, asserting that the court has no subject matter jurisdiction for a violation of the Federal Communications Act. Defendants also assert that Forbes has failed to exhaust his administrative remedies and failed to state a cause of action under 42 U.S.C. § 1981.

A Rule 12(b) motion is to be read as a whole, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), and it is to be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983). In addition, complaints are to be "liberally construed in favor of the plaintiff." *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), and *United States v. Advance Machine Corp.*, 547 F.Supp. 1085, 1088 (D. Minn. 1982). It has also been said that all facts pleaded in the complaint are taken to be true for 12(b)(6) purposes, *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740 (1976), and all reasonable inferences from facts pleaded in the complaint are to be drawn and deemed to be true. *See* Wright & Miller, *Federal Practice and Procedure* § 1363 (1969).

After an examination of Forbes' complaint and amended complaint, it is apparent that Forbes can "prove no set of facts in support of his claim which would entitle him to relief." In light of *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), Forbes has no cause of action under either the Federal Communications Act or 42 U.S.C. § 1983 for denial of participation in the congressional debate or for denial of requested air time for political advertisements. Furthermore, Forbes had failed to state a claim under 42 U.S.C. § 1981.

In his pleadings, Forbes leans heavily upon the Constitution and its framers, asserting that he and his constituents have been denied their inalienable rights as American citizens to participate in election debates and television campaigning. Forbes, however, is erroneous in his reliance upon the Constitutional provisions as providing a remedy in this instance. The Court of Appeals for the Eighth Circuit recently held that a political candidate has no First Amendment right to appear on televised debates "to any extent greater than the limited right of access granted by the equal time provision of the Federal Communications Act." *DeYoung*, 898 F.2d 632. Finding access to broadcasting to be a creature of federal statute, the court stated that

> [a] political candidate does not have a "constitutional right of broadcast access to air his [or her] views."

Id. at 632, quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. 1980).

Thus, Forbes [sic] right to participate in televised debates and air political advertisements stems entirely from the equal time provision of the Federal Communications Act. See 47 U.S.C. § 315(a). The Act, however, does not provide expressly for a private cause of action for violation of its provisions. While the *DeYoung* court found no legislative history on point, the court found the legislative structure of the Act and the FCC to be helpful. The court noted that the Act establishes "a unified and comprehensive regulatory system for the [telecommunications] industry." *Id.* at 633, quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Recognizing that Congress had created the FCC and granted it broad regulatory authority and remedial power, the court found that

> the administrative enforcement mechanism established by the Act and the broad authority vested in the FCC to regulate broadcasters in general and to enforce the equal time provisions in particular indicate that Congress did not intend to create a private cause of action to enforce the equal time provision.

DeYoung, 898 F.2d at 634. Thus, consistent with *DeYoung*, this court finds that Forbes has no federal cause of action pursuant to the Constitution or the Federal Communications Act for denial of participation in a congressional candidates' debate or for denial of Pro-Life advertisements at times other than "safe harbor" hours. Forbes must seek remedy for his alleged violations with the FCC. Likewise, Forbes has no cause of action for enforcement of the Federal Communications Act under 42 U.S.C. § 1983. The Eighth Circuit similarly held in *DeYoung* that "a § 1983 remedy for violation of the equal time provision would be inconsistent with the overall legislative scheme." *DeYoung*, 898 F.2d at 635. Forbes' sole remedy for any alleged violation of the provision of this Act, therefore, lies solely within the administrative powers of the FCC.

Forbes has also alleged that conduct on behalf of the defendants, in their official capacity, violated 42 U.S.C. § 1981. The complaint, however, is void of any alleged racial discrimination, fatal to a § 1981 claim. *Fantroy v. Greater St. Louis Labor Council*, 478 F. Supp. 355 (E.D. Mo. 1979). Forbes and his constituents have alleged discrimination by the defendants on behalf of Forbes' political beliefs rather than racially motivated discrimination. Thus, Forbes' § 1981 claim against the defendants must also fail as a matter of law. Likewise, Forbes [sic] conspiracy allegations must fail. It is well settled that unsupported,

conclusory allegations of a conspiracy, such as those pled by Forbes, are insufficient to state a claim under the Civil Rights Acts. *Slotnick v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980). The court finds, therefore, that the plaintiffs' constitutional and statutory claims must fail as a matter of law. The defendants' motions to dismiss are granted and this action is dismissed.

A separate order in accordance herewith will be entered concurrently.

Yours very truly,

/s/ H. Franklin Waters

cc: U.S. Clerk

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RALPH P. FORBES AND THE PEOPLE
PLAINTIFFS

v. Civil No. 92-2190

THE ARROGANT ORWELLIAN BUREAUCRATS
OF AETN, et al.
DEFENDANTS

ORDER

On October 19, 1992, Plaintiff Ralph Forbes, who resides in London, Arkansas, filed this civil rights complaint under 42 U.S.C. § 1981, et. seq., naming among the defendants the Arkansas Education Television Commission Network Foundation, its board of directors, and Governor Bill Clinton.

Forbes is an independent candidate for the office of United States Representative for the 3rd Congressional District and will have his name on the ballot in the general election of November 3, 1992. (See exhibits to complaint.) He labels the complaint a class action on behalf of himself and his constituents and complains that the defendants unlawfully closed down polling places in counties he carried in 1990, tampered with the voting process in an attempt to

defeat him, and denied his access to public facilities for expression of political beliefs. He requests declaratory and injunctive relief plus compensatory and punitive damages.

A specific allegation in the complaint is that the Arkansas Education Network (AETN), located in Conway, Arkansas, denied his request to participate in a debate to be held this Thursday evening, October 22, between the congressional candidates of the Republican and Democratic parties. Before us is Forbes' motion for temporary restraining order/preliminary injunction to enjoin defendants from barring him from the debate.

Because Forbes has no cause of action against the defendants, based on the upcoming debate, we find that the request for injunctive relief should be denied. *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990) was a suit for damages by a senatorial candidate who alleged he was excluded from a televised debate by a public television station. The Eighth Circuit affirmed the district court's order dismissing the case, finding that (1) political candidates do not have a constitutional right to appear on television, (2) a political candidate does not have a private cause of action to enforce the equal time provision of the Federal Communications Act, 47 U.S.C. § 315(a) and is relegated to the administrative remedies promulgated by the FCC, and (3) the equal time provision of the Federal Communications Act is not enforceable under the civil rights statute, 42 U.S.C. § 1983, because although the violation of a federal right is involved, there is a comprehensive administrative mechanism to enforce candidates rights to equal time.

Here, Forbes attempts to enforce the equal time provision under a civil rights statute, 42 U.S.C. § 1981, and we find under the guidance of *DeYoung v. Patten* the claim

is subject to dismissal for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Preliminary injunctive relief requires consideration of the probability that movant will succeed on the merits, among other factors. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1991). Here, there is no likelihood of success on the merits of this claim and the request for injunctive relief is hereby denied.[1/]

IT IS SO ORDERED this 20th day of October 1992.

/s/ Hon. H. Franklin Waters
Chief, U.S. District Court

1/ It appears venue is proper in this district under the 1990 revision to the general venue statute, 28 U.S.C. § 1391 which provides in subsection (b) that where jurisdiction is not founded solely on diversity of citizenship, the action may be brought in a judicial district where any defendant resides, if all defendants reside in the same State. To our personal knowledge, at least one of the defendants resides in this district.

APPENDIX N

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULES

The Arkansas Code, Chapter 3 provides:

6-3-101. Creation.

There is created an agency to be known as the Arkansas Educational Television Commission, hereinafter called "the commission."

6-3-102. Members.

(a)(1) The commission shall consist of eight (8) members, who shall be residents and qualified electors of the State of Arkansas, with at least one (1) member being appointed from each of the congressional districts of the state.

(2) At least one (1) member shall be a person who is actively engaged in the field of education in the public school system of this state, and one (1) member shall be a person actively engaged in education in an institution of higher learning in this state.

(3) No member of the commission shall hold any other office of profit or trust under the United States, the State of Arkansas, or any political subdivision thereof, or any office or employment paid in whole or in part by any funds derived from tax sources, except persons actively engaged in the field of education in the public schools or institutions of higher learning in this state.

(4) No member of the commission shall have any financial interest in any facilities such as the commission is authorized to deal with, including any interest in any commercial television or radio station.

(b)(1) Commissioners shall be appointed by the Governor with the advice and consent of the Senate for terms of eight (8) years.

(2) Commissioners shall be eligible for reappointment.

(3) If a vacancy occurs at a time when the Senate is in session, the Governor shall, with the advice and consent of the Senate, appoint another commissioner for the unexpired term.

(4) If a vacancy occurs when the Senate is not in session, the Governor shall appoint a commissioner who shall take office immediately, but his appointment shall be subject to confirmation by the Senate at the next session of the General Assembly.

(5) If the appointment of such commissioner is confirmed by the Senate, he shall serve the remainder of the unexpired term.

(c) Each member shall be entitled to receive fifty dollars ($50.00) for each day actually in attendance at commission meetings, plus reimbursement for actual, reasonable, and necessary expenses for meals, lodging, and related expenses in attending board meetings, or other official travel in behalf of the commission, and shall be entitled to mileage at the rate provided by law or regulation for travel by state employees for official travel.

6-3-103. Organization -- Rules and regulations.

(a) Promptly after their appointment, the commissioners shall meet to organize.

(b) At the meeting they shall choose from their number a chairman, a secretary, and such other officers as they deem necessary.

(c) Thereafter officers shall be elected annually.

(d) The commission shall adopt rules regulating the conduct of its meetings and the transaction of the business of the commission.

6-3-104. Agents and employees.

(a) The commission may appoint such agents and employees as it deems necessary or may delegate to one (1) or more of its members, officers, agents, or employees such powers and duties as it deems proper and is authorized to do by legislation.

(b)(1) The commission is authorized to contract with other educational institutions in this state for the employment and use, on a contract basis, of the full-time or part-time services of employees of those educational institutions and may pay for their services in accordance with the provisions of such contracts.

(2) In the event the Arkansas Educational Television Commission shall determine that the use of full-time or part-time services of employees of such other educational institutions in this state shall make it necessary that payment therefor be from funds appropriated for the

commission for the payment of regular salaries of employees of the commission, upon certification of the amount to the Chief Fiscal Officer of the State, the amount shall be transferred from the appropriation made for regular salaries of the commission for the fiscal year involved to the appropriation for maintenance and general operation of the commission for such fiscal year and may be expended for payments under contracts as authorized herein.

6-3-105. Purpose -- Powers and duties generally.

(a) The commission is organized for the purpose of making the benefits of educational television available to and promoting its use by inhabitants of Arkansas.

(b) To this end, it is empowered and directed to survey, study, and appraise the need for an overall plan for the use of television facilities available for noncommercial educational use in the state.

(c) The commission is specifically charged with the duty of controlling and supervising the use of channels reserved by the Federal Communications Commission to Arkansas for noncommercial educational use.

(d) It may designate the location of stations to utilize such channels and make rules and regulations governing the operation of these stations and the programs televised over these channels. The commission may own and operate television stations to utilize these channels, or it may contract with individuals, corporations, educational institutions, or other governmental agencies for the operation of such stations.

6-3-106. Execution of contracts.

The commission is authorized to execute all contracts and other instruments necessary an convenient to carry out the mandates of this chapter.

6-3-107. Acceptance of gifts or grants.

(a) The commission may solicit and accept gifts or grants of money, real or personal property, and voluntary and uncompensated services from any person, federal or other governmental agency, board of education, educational institution, or commercial or industrial enterprise.

(b) Any gifts and grants of money and any moneys derived from the sale of real or personal property donated to the commission may be placed in a bank in this state and may be disbursed by the commission for the purposes for which the gifts, grants, or real or personal property was donated or granted.

6-3-108. Equipment -- Limits on commission responsibility.

After receipt of any equipment furnished or installed by the Educational Television Commission, the commission will not be responsible:

(1) For additional reception problems which may occur; or

(2) For replacement of any of the furnished equipment.

6-3-109. Revolving cash fund.

(a) The commission is authorized to establish in a bank authorized to do business in this state, selected by the commission, a revolving cash fund into which the commission shall pay all funds received from the sale of instructional materials prepared by the commission or purchased by the commission and sold to schools in this state in connection with educational television programs.

(b) In addition, the commission is authorized to expend from the revolving cash fund amounts necessary to purchase instructional materials for sale to schools to be used for educational television purposes, including the cost of freight, postage, handling, and other delivery costs incidental to the purchase or sale.

(c) The commission shall keep a complete record of all receipts and expenditures from the revolving cash fund and shall make the record available to the legislative auditors for audit and verification.

6-3-110. Appropriation and annual audit -- State employees.

(a) No appropriation made available to the Arkansas Educational Television Commission or the Division of Educational Television of the State Department of Education shall be available until such time as the Chairman of the Arkansas Educational Television Commission certifies, in writing, to the Legislative Joint Auditing Committee that an audit is being conducted of the Arkansas Educational Telecommunications Network Foundation for the previous fiscal year and has promptly been made available to that committee.

(b) At the end of each fiscal year, the chairman of the commission shall initiate an audit of the Arkansas Educational Telecommunications Network Foundation by a recognized and certified public accounting firm acceptable to the Legislative Auditor with such audit standards and schedules that may be promulgated by the Legislative Auditor, such audit to be paid for by the Arkansas Educational Telecommunications Network Foundation.

(c) No person employed by the Arkansas Educational Television Commission and paid from state funds shall receive supplemental compensation or remuneration from funds not appropriated by the state.

(d) State employees of the Division of Arkansas Educational Television, in fulfilling their day-to-day responsibilities, are to be supervised only by appropriate state employees, and, to that end, no person or employee paid from funds not appropriated herein shall supervise any state employee as herein provided.

6-3-111. Budget requests.

The Director of the Educational Television Division of the Department of Educational shall submit budget requests of the Educational Television Division of the State Board of Education and the Director of the Department of Education, General Education Division, for their review and approval, before the budget submissions are forwarded to the Governor and the Arkansas Legislative Council.

6-3-112. Authorization for lease of facilities.

(a) The Arkansas Educational Television Commission is authorized and empowered to arrange for the

use of its facilities, including, without limitation, tower space, studios, and equipment, by any federal, state, or local governmental agency or by any other person, from time to time, as any of such facilities are not needed by the commission, and to collect fees and charges, as the commission determines to be reasonable, in connection with the use of any such facilities by any other person; provided, however, agencies and educational institutions of the State of Arkansas shall have preference for the use of commission facilities over other entities and persons and shall be assessed fees and charges at preferential rates as determined by the commission.

(b) The commission shall be exempt from complying with general provisions of other laws dealing with public commodities and facilities and their acquisition, leasing, or disposition in relation to the use of its studios by other persons in such cases, as advertising for bids would be impractical because of time limitations.

(c) Any revenue received by the commission from the use of its facilities by other persons shall be cash funds pursuant to § 6-3-109.

(d) The commission is authorized to promulgate such regulations as it deems necessary for the implementation of this section.

6-3-113. Eminent domain power.

(a)(1) The Arkansas Educational Television Commission is hereby granted the right of eminent domain to condemn real property leased or rented by the commission if the property is deemed to be necessary or desirable by the commission for making the benefits of educational television

available to the citizens of Arkansas or to otherwise carry out the purposes of § 6-3-101 et seq., and if the commission is unable to agree with the owner of the land, or if, by legal incapacity or absence of the owner, no agreement can be made for the purchase.

(2) All suits for condemnation of real property under the provisions of this section shall be brought by the Arkansas Educational Television Commission in the name of the State of Arkansas.

(3) The real property may be acquired in fee simple or in any lesser estate.

(b) The commission is authorized to make payment for real property acquired under the provisions of this section out of any appropriation made for the Arkansas Educational Television Commission. No land shall be take or contracted to be taken of an amount beyond the sum available therefor.

(c) The commission shall exercise the power of eminent domain in the manner provided for in § 27-67-311 et seq.

(d) Actions by the commission to condemn real property shall be brought in the county in which the land is situated. If the land is located in more than one (1) county, the action may be brought in any county in which the land is situated.

The Arkansas Code, Chapter 16 provides:

25-16-804. Removal and replacement.

(a)(1) As used in this section, unless the context otherwise requires, "good cause" includes:

(A) Conduct constituting a criminal offense involving moral turpitude;

(B) Gross dereliction of duty; or

(C) Gross abuse of authority.

(2) "Good cause" does not include any vote, decision, opinion, or other regularly performed or otherwise reasonably exercised power of a board or commission member.

(b)(1) The Governor may remove, for good cause, a state board or commission member whose office or position is filled by gubernatorial appointment, subject to confirmation by the Senate. If the Senate is not in session, confirmation shall be by written petition of a majority of the Senators.

(2) The Governor may appoint a qualified individual to replace the board or commission member removed to serve the remainder of his term, subject to confirmation by the Senate under circumstances where confirmation is normally required.

(c) All orders of removal by the Governor shall be in writing, shall be delivered to the member removed or counsel for the member, and shall specifically set out the grounds relied upon for removal.

(d)(1) A removed board or commission member may institute proceedings for review by filing a petition in the

Circuit Court of Pulaski County within thirty (30) days after delivery to him or his attorney of the Governor's order of removal.

(2) This petition shall not supersede or stay the order of removal, nor shall any court enter an order to this effect or one which would impair the authority of the Governor to appoint a replacement whose service begins immediately upon fulfillment of the normal requirements for assuming office.

(e)(1) When the matter is heard by the Circuit Court of Pulaski County, it shall be tried de novo without a jury.

(2) The Governor shall have the burden of proof to show by clear and convincing evidence that good cause existed for removal of the board or commission member in question from office and for revoking his commission.

(3) If the court determines that good cause has been shown, it shall enter an order removing the board or commission member in question from office and revoking his commission. If the court determines that good cause has not been shown by clear and convincing evidence, the court shall order the removed member reinstated to his position and, upon request, shall award a reasonable attorney's fee and court costs to the reinstated party.

(f)(1) Subject to the restrictions of subsection (d) of this section on supersedeas or stay orders, a removed board or commission member may appeal the decision of the circuit court to the Arkansas Supreme Court.

(2) The Governor may appeal the decision of the circuit court to the Arkansas Supreme Court, but the appeal

shall not preclude the circuit court, in its discretion, from entering an order reinstating the removed member.

(g) No board or commission action in which the appointed replacement participates shall be void, voidable, or in any way subject to invalidation on grounds of participation of the appointed replacement or lack of participation by the removed member in the event that the circuit court or the Arkansas Supreme Court orders the removed member reinstated.

The First Amendment to the Constitution of the United States provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

47 U.S.C. § 153 provides:

For the purposes of this chapter, unless the context otherwise requires --

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 309 provides:

(a) Consideration in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 312 provides:

Administrative Sanctions (a) The Commission may revoke any station license or construction permit --

... (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

47 U.S.C. § 315 provides:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

47 U.S.C. § 402 provides:

(a) *Procedure.* Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 C.F.R. § 73.1941 provides:

(a) *General requirements.* Except as otherwise indicated in § 73.1944, no station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit

any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such licensee shall have no power of censorship over the material broadcast by any such candidate. Appearance by a legally qualified candidate on any:

(1) Bona fide newscast;

(2) Bona fide news interview;

(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or

(4) On-the-spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of broadcasting station. (section 315(a) of the Communications Act.)

(b) *Uses.* As used in this section and § 73.1942, the term "use" means candidate appearance (including by voice or picture) or political advertisement that is not exempt under § 73.1941(a)(1)-(4) and that is controlled, approved or sponsored by the candidate or the candidate's authorized Committee after the candidate becomes legally qualified.

(c) *Timing of request.* A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use giving rise to

the right of equal opportunities occurred: Provided, however, That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(d) *Burden of proof.* A candidate requesting equal opportunities of the licensee or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(e) *Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office.

47 C.F.R. § 73.1944 provides:

(a) Section 312(a)(7) of the Communications Act provides that the Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) *Weekend Access.* For purposes of providing reasonable access, a licensee shall make its facilities available for use by federal candidates on the weekend before the election if the licensee has provided similar access to commercial advertisers during the year preceding the relevant election period. Licensees shall not discriminate between candidates with regard to weekend access.

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RALPH P. FORBES AND THE PEOPLE PLAINTIFFS

v. NO. 92-2190

THE ARROGANT ORWELLIAN BUREAUCRATS OF THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION NETWORK FOUNDATION AND ITS BOARD OF DIRECTORS IN THEIR OFFICIAL CAPACITIES; THE ARKANSAS EDUCATIONAL TELECOMMUNICATIONS AND ITS MEMBERS AND OFFICERS; SUSAN J. HOWARTH, in her official capacity as Executive Director; VICTOR FLEMING, in his official capacity as Chairman; G. E. CAMPBELL, in his official capacity as Vice Chairman; DR. CAROLINE WHITSON, in her official capacity as Secretary; COMMISSIONER DIANE BLAIR, in her official capacity; COMMISSIONER S. McADAMS, in his official capacity; COMMISSIONER JAMES ROSS, in his official capacity; COMMISSIONER JERRY McINTOSH, in his official capacity; COMMISSIONER LILLIAN SPRINGER, in her official capacity; ANY L. OLIVER, in her official capacity as Production Manager; WILLIAM CLINTON, in his official capacity as Governor of the State of Arkansas; and certain "JOHN DOE" Crooked,

Lying Politicians and Political "Dirty Tricks" Operatives; the Special Interests That control the Politicians and Exert Illegal Influence on *AETN* DEFENDANTS

BRIEF IN SUPPORT OF MOTION TO DISMISS

Come the separate defendants and in support of their motion to dismiss, submit the following memorandum brief:

I.

INTRODUCTION

Plaintiff Forbes filed this action purportedly on behalf of a class of registered voters in the Third Congressional District seeking declaratory, monetary and injunctive relief against all defendants. Plaintiff alleges past acts by "certain defendants" in regards to past elections and further alleges that his right to participate in a public television debate between candidates for U.S. Representative, Third Congressional District, had been denied by defendants. The plaintiff alleges violation of United States and State Constitutions and the Federal Communications Act, 47 U.S.C. § 315 and brings this action under 42 U.S.C. § 1981 *et seq.* Defendants submit that plaintiff's complaint should be dismissed under the Eleventh Amendment as to monetary relief because the court lacks jurisdiction over the subject matter and the persons of the defendants in regards to the claim for monetary relief. In addition, defendants submit that plaintiff has failed to state a claim upon which this Court can grant relief because plaintiff Forbes does not possess a First or Fourteenth Amendment right to appear in a public television political debate and there is no personal

cause of action arising under the Federal Communications Act to appear in such a debate. Furthermore, plaintiff states no claim as against defendant Amy Oliver or William Clinton. Plaintiff has asserted no claim under 42 U.S.C. § 1981 *et seq.* and the debate and election at issue herein have passed, therefore the issues asserted by plaintiff Forbes have become moot.

Finally, assuming plaintiff has asserted some claim under the State Constitution, because the federal claims herein should be dismissed, the court lacks jurisdiction to adjudicate such state law issues or in the alternative should decline to exercise that jurisdiction so that the State Constitution can be interpreted by the Arkansas courts.

II.

First, plaintiff seeks monetary relief from all defendants. The separate defendants have been sued in their official capacities. An official capacity suit against these individual defendants is the same as a suit against the State which is barred by the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651 (1974). *See also* Will v. *Michigan Department of State Police*, 491 U.S. 58 (1989) and *Fogle v. Benton County SCAN*, 665 F.Supp. 729 (W.D. Ark. 1987). The State of Arkansas has not waived its sovereign immunity and therefore the claim for monetary relief against these defendants must fail.

III.

Plaintiff fails to state a claim upon which the court can grant relief as to the separate defendants.

A.

Plaintiff fails to state a claim upon which the court can grant relief as to his alleged right to appear on a public television debate between candidates for political office. The Eighth Circuit has addressed this specific issue in *Deyoung v. Patten*, 898 F.2d 628 (8th Cir. 1990) in which the Court held that no First Amendment right exist [sic] to appear in such a debate. *See also*, *Chandler v. Georgia Public Telecommunication Comm'n.*, 917 F.2d 486 (llth Cir. 1990) and *Johnson v. Federal Communications Comm'n.*, 829 F.2d 157 (D.C. 1987).

B.

DeYoung also held that an individual such as plaintiff has no implied personal cause of action under the Federal Communications Act, 47 U.S.C. § 315, to appear in such a debate. The Court assumed that the public television station initiated the debate and held that the station was subject to the equal time provisions of § 315(a). The Court then upheld the district court's dismissal of the complaint because no implied private cause of action existed under the Federal Communications Act and therefore the plaintiff had stated no claim under 42 U.S.C. § 1983.

Even if a private cause of action existed under § 315(a), the debate at issue is exempt from the equal time provision of § 315(a) as on-the-spot coverage of a bona fide news event. Defendants submit that the *DeYoung* court did not address this issue because it held no private cause of action existed. The issue was addressed by the Federal Communications Commission in interpreting its statute *In re Henry Geller*, 95 FCC 2d 1236 (1983). The FCC determined that the exclusion under § 315(a) for on-the-spot

coverage of a bona fide news event included political debates sponsored by a broadcaster. The Commission applied this interpretation in 1986 in *Sagan v. Pennsylvania Public Television Network*, 1 F.C.C. Rcd 10 (1986). Most recently, the Commission again applied this exclusion to a public television broadcast of a political debate in its May 18, 1992, letter to Jim Trinity released May 26, 1992. A copy of said letter is attached hereto as Exhibit A. Consequently, even if a private cause of action exists under § 315, this debate is exempt as coverage as a bona fide news event.

C.

The issue of a Fourteenth Amendment right to appear in a public television political debate was addressed in *Chandler, supra*. *Chandler* held that the exclusion of a candidate from such a debate did not violate either the First or the Fourteenth Amendments. The latter was based upon a finding that the broadcaster had a reasonable basis for the distinction between the major and minority party candidates. By plaintiff's own allegations at page 6 of his motion for emergency TRO herein, plaintiff states that AETN denied plaintiff Forbes the right to appear on said debate because Forbes was not a serious candidate, that is candidate Forbes did not have any substantial support among the voters. Consequently, by plaintiff's own admission, defendants had a reasonable basis upon which to distinguish plaintiff Forbes from the two majority party candidates in determining which candidate should participate in a debate broadcast as a news worthy event, that is the public's interest in the respective candidates. Because a reasonable basis existed for this distinction, there can be no Equal Protection violation under the Fourteenth Amendment. *Chandler, supra.*

D.

Furthermore, plaintiff fails to state a claim as to defendants Clinton or Oliver. At page 3 of plaintiff's motion for emergency TRO, plaintiff alleges that defendant Clinton is a necessary party because he appointed at least seven of the eight AETN Commissioners and reviews the AETN budget. Plaintiff further alleges that defendant Clinton made certain statements regarding the right of the people to hear defendant Clinton's independent adversary. Plaintiff also alleged at page 6, paragraph 8 of its motion for an emergency TRO that defendant Oliver reported that AETN refused to permit plaintiff to participate in the debate because he was "not a serious candidate."

It is patent that these allegations simply do not state any claim upon which this Court can grant relief as to either defendant Clinton or Oliver.

E.

Plaintiff fails to state a claim under 42 U.S.C. § 1981 *et seq.* The Complaint is void of any allegations of racial discrimination which is fatal to a § 1981 claim. *Fantroy v. Greater St. Louis Labor Council*, 478 F.Supp. 355 (E.D. Mo. 1979) citing *DeGraffenreid v. General Motors Assembly Division*, 558 F.2d 480 (8th Cir. 1977). No allegation in the Complaint is cognizable under § 1982. Plaintiff has no rights under the First or Fourteenth Amendments or 47 U.S.C. § 315 as alleged, so no § 1983 claim is pleaded. No. [sic] § 1985 claim exists because plaintiff has not stated a claim of deprivation of equal protection or privileges and immunities or other allegations cognizable under § 1985 which addresses racial or perhaps other class based, invidiously discriminatory animus behind the conspirator's

action. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Since *Griffin*, courts have held § 1985 does not apply to political affiliations. *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985); *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985); *Smith v. Turner*, 764 F.Supp. 632 (N.D. Ga. 1991); *Herhold v. Chicago*, 723 F.Supp. 20 (N.D. Ill. 1989); *Jeffries v. Celeste*, 654 F.Supp. 305 (S.D. Ohio 1986).

Furthermore, no specific facts tending to support any claim under § 1985 are set out in plaintiff's pleadings and same should be dismissed because the allegations are only conclusory and are void of a factual basis. *Christian Populist Party v. Secretary of State*, 650 F.Supp. 1205 (E.D. Ark. 1987). Section 1986 is derivative of liability under § 1985 and no independent liability exists. Consequently, plaintiff has stated no claim under any provision of 42 U.S.C. § 1981 *et seq.*

F.

Plaintiff fails to state a claim against the AETN Commissioners, Executive Director and Production Manager and Defendant Clinton as to allegations in the Complaint in plaintiff's 1990 race for Lieutenant Governor. Said allegations were that "certain defendants" engaged in wholesale bartering of block votes, paid operatives thousands of dollars to wage a war of dirty tricks, etc., closed down polling places and denied access to the ballot box. These allegations are obviously against the unnamed "certain 'John Doe Crooked Lying Politicians and Political 'Dirty Tricks' Operatives" rather than the AETN defendants who exercise authority solely pursuant to A.C.A. § 6-3-101 *et seq.* That authority is limited to providing public television to Arkansas. These defendants have no power to act in any

manner regarding these allegations of conduct in controlling elections and voting places.

As noted herein, the only allegations against Defendant Clinton are his appointment of AETN Commissioners and review of AETN's budget.

G.

Plaintiff fails to meet the requirements of Rule 22, FRCP to be a class representative. The class representative must share the interest and suffer the same injury as the fellow class members. *Roby v. St. Louis Southwestern Ry. Co.*, 775 F.2d 959 (8th Cir. 1985). Plaintiff fails to share either element with class members.

Plaintiff's claims are voters were deprived of the right to vote for him in the 1990 Lieutenant Governor's race and could not view him participating in the debate between the 1992 Third Congressional District candidates. Plaintiff claimed injuries and interest are not the same. He was unable to appear on the debate and may have lost votes if others were denied the opportunity to vote. Thus, plaintiff does not qualify as a class representative.

H.

Plaintiff's claim regarding the scheduled debate has become moot because the debate and the election in which plaintiff Forbes was seeking office have occurred. Consequently, plaintiff's claims, if any, regarding participation in the public television political debate among candidates in the Third Congressional District, have simply become moot. No controversy now exists. *Iron Arrow Honer Society v. Heckler*, 464 U.S. 67, (1983) plaintiff lacks

standing, *Martin v. Sargent*, 780 F.2d 1334 (8th Cir. 1985) and any judgment would be merely an advisory opinion. *City of Los Angeles v. Davis*, 440 U.S. 625 (1979). The Court should not decide a constitutional issue unnecessarily. *Kremens v. Bartley*, 437 U.S. 119 (1977). It is not likely that the facts of this case will arise again; however, if a case reoccurred, there would be sufficient time to adjudicate the issue under Rule 65(a)(1). Plaintiff's Exhibit 3, his letter to defendant Howarth requesting to participate in the October 22, debate and defendants' reply of September 4, Exhibit 4, demonstrate that sufficient time would exist to litigate the issue so mootness should not reoccur. It should be noted plaintiff has not alleged any intent to run for future office.

IV.

Implicit in the jurisdiction of the district court to exercise pendent jurisdiction over state law claims is the existing jurisdiction of the court under federal law. *See Williams v. Bennett*, 689 F.2d 1370, 1379 (llth Cir. 1982). Where all the claims arising under federal law have been dismissed, the court may also dismiss any remaining claims under state law. *Curtis v. Sears Roebuck & Co.*, 754 F.2d 781 (8th Cir. 1985). *Curtis v. State of Michigan*, 548 F.2d 172 (6th Cir. 1977); The dismissal of pendent state law claims should be particularly compelling in this case should the court dismiss the plaintiff's federal claims. There has been little activity before the district court so that it would be a wise exercise of judicial discretion and judicial resources to decline to adjudicate the state law claims and leave those issues to be determined by the state court. Defendants submit that there is no reasonably clear guidance provided by existing Arkansas court decisions to guide this court in construing the relevant provision of the Arkansas Constitution, Article 2, § 6, and that interpretation of the

State Constitution is a matter of important state interest. There is no reason why plaintiff could not litigate any state law claims in the Arkansas courts so that those courts have the opportunity to interpret and apply state law. Consequently, if the state retains any jurisdiction over the pendent state law claims herein, it should decline to exercise that jurisdiction and permit the Arkansas courts to interpret and apply the relevant provisions of the Arkansas Constitution.

CONCLUSION

Defendants submit that plaintiff has no claim upon which this Court can grant relief and that this action should be dismissed in its entirety as to the separate defendants.

Respectfully submitted,

WINSTON BRYANT
Attorney General

BY: /s/ Thomas S. Gay by TH
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Attorneys for Separate
Defendants

CERTIFICATE OF SERVICE

I, Thomas S. Gay, certify that a copy of the foregoing document has been served by U.S. Mail, postage prepaid, this *9* day of November, 1992, to Ralph P. Forbes, Box 88, London, AR 72847.

/s/ Thomas S. Gay by TH
Thomas S. Gay

APPENDIX P

LETTER FROM SUSAN HOWARTH
TO RALPH P. FORBES

September 4, 1992

Ralph P. Forbes
Box 88
London, AR 72847

Dear Mr. Forbes:

This is written in response to your letter of August 24 regarding the congressional debate produced, jointly, by AETN and the Associated Press.

Under *47 USC 315*, as interpreted by the Federal Communications Commission and the Courts, debates are exempt from the equal opportunity requirement.

AETN has made a bona fide journalistic judgement that our viewers would best be served by limiting the debate to elected nominees of the two major parties.

Your letter indicates an interest in an administrative appeal of an adverse decision. You should feel free to contact the Fairness/Political Programming Branch of the Enforcement Division, Federal Communications Commission, Area Code 202-632-7586.

Sincerely,

/s/ Susan Howarth

SUSAN HOWARTH
Executive Director

PS: Mail intended for AETN management should be addressed to P.O. Box 1250, Conway, AR 72032. P.O. Box 100 is a bank dropbox and mail so addressed reaches us one to three days after arrival in the Conway Post Office.

APPENDIX Q

LETTER FROM RALPH P. FORBES
TO SUSAN HOWARTH

FORBES FOR US
* BOX 88 *
* LONDON, AR 72847 *

501-293-4641

August 24, 1992

Ms. Susan Howarth
AETN, President
Box 100
Conway, AR 72032

Dear Ms. Howarth,

Thank you for fulfilling your civic duty by scheduling a debate between the candidates for the office of House of Representatives from the 3rd District of Arkansas.

This is to notify you that I am the certified Independent Candidate for this office, and I am respectfully requesting that I be included on equal terms with my two opponents in this debate.

Because I am a candidate for change, in the past I have experienced some shameful violations of my rights, including party bosses refusing to certify my nomination after I won a statewide primary election by 63% fair and

square; being forced into a run-off after I won 53% of the total vote in a 3-way statewide primary in which I carried 72 of Arkansas' 75 counties. The run-off was an illegal election because more than 75% of the voting places required by law to be open were closed in the 72 counties which I carried in the primary. These are only a few of the blatant examples of discrimination, dirty politics and suppression of the democratic process in thousands of pages of court cases in state and federal courts in Arkansas.

It is my experience that the politicians, their fat cat wire pullers, and the special interests that control this state will stop at nothing, no mater how low down, filthy, disgusting and illegal, including censorship, denial of the right to vote via *affirmative action* "elections," conspiring to deny rights under color of law, *ad nauseam*, to prevent the People from replacing these crooks and their tyrannical ilk.

Ms. Howarth, I am certain that you and AETN want to do the right and fair thing by inviting me and affording me equal opportunity, but I am also sure you will be subjected to tremendous pressures from special interests, scared politicians and the terror squads of "politically correct" bigots to censor me and my ideas. This is especially undesirable as the eyes of the nation and the world will be focused on Arkansas during this presidential election with Governor Clinton being the supreme executive over the publicly owned, Arkansas Education Television Network.

Let me share some of thoughts and words of one of my philosophical mentors that are a strong defense against those who would try to deny the people of Arkansas, especially the 3rd District, from hearing me and my ideas to help them:

"If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."

Thomas Jefferson, Letter to Col. Charles Yancey, Jan. 6, 1816

"Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day.

Thomas Jefferson, Letter to Du Pont de Nemours, April 24, 1816

"I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."

Thomas Jefferson, Letter to William Charles Jarvis, Sept. 28, 1820

"Men by their constitutions are naturally divided into two parties:

(1) Those who fear and distrust the people, and wish to draw all powers from them into the hands of the higher classes. (2) Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist: and in every one where they are free to think, speak and write, they will declare themselves."

Thomas Jefferson, Letter to Henry Lee, Aug. 10, 1824

"For here we are not afraid to follow the truth wherever it might lead, nor to tolerate any error so long as reason is left to combat it."

Thomas Jefferson

"The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspaper, or newspapers without government, I should not hesitate a moment to prefer the latter."

Thomas Jefferson, Letter to Col. Edward Carrington, Jan. 16, 1787

"God who gave us life gave us liberty. Can the liberty of a nation be secure when we have removed a conviction that these liberties are a gift of God?

Indeed I tremble for my country when I reflect that God is just, that his justice cannot sleep forever."

Thomas Jefferson, *Notes on the State of Virginia*, Query 6 (1781-1785)

"I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man."

Thomas Jefferson, Letter to Dr. Benjamin Rush, Sept. 23, 1800

The wording of *47 USC 315* is so plain and simple that every ordinary American with the commonsense God gave him or her knows what it says and that it means I have a right to appear and they have a right to hear me so they can make an intelligent, informed choice when they vote.

"I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

James Madison, Speech in the Virginia Convention, June 16, 1788

Unfortunately, in 1983 some lawyers and bureaucrats arbitrarily, misinterpreted the exemption provision, so that ala *1984's "Ministry of Truth"* the law has been turned inside out to nullify its purpose by doing *exactly the opposite of what it says*:

"Affording equal access to all candidates," according to this worm-tongued, truth-twisting theory, "means that those in power may exclude and discriminate against candidates of genuine change."

But double-minded Orwellian double-speak and double-think is, alas, all too common in the Alice in Wonderland created by the politicians and special interest lawyers who run this country as if they were the Mad Hatter, the March Hare and the Queen of Hearts.

To deny anyone equal access is discriminatory and wrong, isn't this true?

To suppress any ideas or censor anyone's expression of opinion is a violation of Free Speech, which I am sure you would not allow to happen.

Ms. Howarth, I would appreciate receiving your reply to my request for equal opportunity and free speech *as soon as possible*.

Because if the dirty politics I have fought in the past is still doing "bidnis" as usual and if they have the power to pressure AETN to deny me and the people of Arkansas our rights, *then I must have sufficient time to exhaust my*

"administrative remedies," so I can get an appropriate order from a federal court in time so the people can hear me before the election is over.

Yours for A Free and Equal Opportunity America,

/s/ Ralph P. Forbes

CC: